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United States
Circuit Court of Appeals
For the Ninth Circuit.

DAVID C. JEFFCOTT and ELSIE JEFFCOTT,
his wife,

Appellants,

vs.

EDWARD J. DONOVAN,

Appellee.

Transcript of Record

In Two Volumes

VOLUME II

Pages 459 to 561

FILED

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PAUL F. O'BRIEN,

CLERK

Upon Appeal from the District Court of the United States
for the District of Arizona.

No. 10251

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Upon Appeal from the District Court of the United States
for the District of Arizona.

ELSIE JEFFCOTT

one of the defendants herein, called as a witness on behalf of defendants, and having been first duly sworn according to law to testify to the truth, the whole truth and nothing but the truth, was examined and cross-examined and testified as follows:

Direct Examination

By Mr. Robertson:

Q. Your name is Elsie Jeffcott? A. Yes.

Q. You are one of the defendants in this action?

A. Yes.

Q. Do you recall, Mrs. Jeffcott, when you first met Dr. Donovan?

A. Immediately preceding the operation.

Q. And where was that? A. In my room.

Q. And that was some seven or eight days after the birth of the baby?

A. I believe it was the eighth day, yes.

Q. And was there more than one person present when he came in?

A. Yes, there was a nurse, and Dr. Carrell and I think [404] Dr. Thompson.

Q. When did you next see him?

A. After the operation.

Q. Where and who was present?

A. It was also in my room. Mr. Jeffcott was there, Mrs. Carrell, Dr. Carrell and Dr. Thompson.

Q. What conversation was had between them and you?

A. Dr. Donovan explained to all of us what he had done to the baby.

(Testimony of Elsie Jeffcott.)

Q. And was that all?

A. That was all.

Q. Was it a long or a very short visit?

A. No, it was short.

Q. When did you next see Dr. Donovan?

A. He came in to say good-bye and told me he was leaving on the plane.

Q. Where was your husband at that time?

A. He was at the ranch.

Q. What conversation did you have with Dr. Donovan at that time?

A. We talked about the flight back, that he would like to see it by daylight, and I said I knew my husband would be very sorry not to see him, that he had planned to get back that day before noon.

Q. What did Dr. Donovan say to that?

A. That he had to go on the eleven o'clock plane, or eleven-thirty. [405]

Q. Do you recall the negotiations or discussions that took place prior to the time Dr. Donovan was called?

A. Very little took place in front of me as I was in bed. I did not hear much of anything.

Q. Can you state whether or not you were in a disturbed frame of mind at the time?

A. Oh, definitely very much so.

Q. And from the objective symptoms would you say that your husband was?

A. Yes, more so than I.

(Testimony of Elsie Jeffcott.)

Q. Upon whom were you relying for advice with reference to what should have been done for the baby?

A. As soon as the baby showed any unusual symptoms, Dr. Thompson was called by Dr. Carrell as being a pediatrician and later on Dr. Thompson asked for Dr. Tappan, and those were the two we relied upon, and, of course, Dr. Carrell.

Q. And whose advice did you accept in employing the nurses? A. Dr. Thompson's.

Q. Did you employ them or did Dr. Thompson employ them for you?

A. Dr. Thompson arranged for them.

Q. Was it your suggestion or Dr. Thompson's that a baby specialist would have to perform the operation? A. Dr. Thompson's.

Q. In other words, he made all arrangements and made the suggestion that Dr. Donovan be employed? A. That is right.

Q. How long was the baby confined to the hospital after the [406] operation?

A. Approximately six weeks.

Q. What was the baby's condition after the operation, that is, when you took over the supervision and care of the baby yourself?

A. His fistula was draining quite a good deal and required a great deal of care in binding and had to be watched.

Q. How long did that condition continue?

A. I believe it stopped draining completely between eight months and a year after the operation.

(Testimony of Elsie Jeffcott.)

Q. Between eight months and a year after the operation? A. Yes.

Q. What is the baby's condition at the present time?

A. He has what they call a ventral hernia.

Q. Does that necessitate any special care?

A. Yes, we have to make for him little corsets which he wears. He has to be protected from falls, running, any activity.

Q. But otherwise, at the present time, the baby is apparently in pretty good shape?

A. Yes.

Q. Do you know whether or not that hernia has to be operated? A. Yes, it does.

Mr. Robertson: That is all. [407]

Cross Examination

By Mr. Allen:

Q. Why did this hernia develop, if you know?

A. I really do not know, Mr. Allen. I think it was first noticed about four or five weeks after he was brought home from the hospital.

Q. That would be somewhere between two or three months following the operation?

A. I cannot say that a doctor noticed it then. I was the first one who noticed that it looked strange. It was not until longer than that it was first noticed by a doctor.

Q. When was it first diagnosed by a doctor?

A. I imagine when the baby was about four and a half or five months old.

(Testimony of Elsie Jeffcott.)

Q. By whom was it diagnosed, Mrs. Jeffcott?

A. Dr. Carrell.

Mr. Allen: No further cross-examination.

Mr. Robertson: That is all. If your Honor please, I have arranged for the various doctors to start coming this afternoon, and if it would be of any advantage to the court or the counsel, I could arrange to start at one-thirty, but at this time I have no further evidence to put on. I have four doctors and I believe by staggering them I can get [408] them all in.

The Court: We have about twelve minutes to go. Suppose we compensate for that by convening at a quarter to two.

Thereupon the court recessed, and convened again at the hour of 1:45 in the afternoon, with the same appearances as in previous sessions.

The Court: Are counsel ready to proceed?

Mr. Robertson: Call Dr. Carrell.

WILLIAM D. CARRELL,

called as a witness herein on behalf of the defendants, having been first duly sworn according to law, to testify to the truth, the whole truth and nothing but the truth, was examined and cross-examined and testified as follows:

Direct Examination

By Mr. Robertson:

Q. Will you state your name, please?

A. William D. Carrell.

Q. Where do you live, Dr. Carrell?

A. Tucson.

Q. What is your profession? [409]

A. Physician.

Q. Are you specializing in any particular type of that work at this time? A. Yes, sir.

Q. Will you state it, please?

A. Obstetrics and gynecology.

Q. And in the course of your work are you doing any surgical work? A. Yes, sir.

Q. What was your background, doctor?

A. Starting how far back?

Q. In connection with your present profession.

A. I went to the University of Illinois; spent to years in pre-medical school at the University of Illinois at Urbana or Champaign. That as from September, 1919, to June, 1921. Then the following fall I entered medical school at the University of Illinois Medical School in Chicago. In 1923, I graduated, received a Bachelor of Science degree

(Testimony of William D. Carrell.)

from that school. I was graduated there in 1925 and received my diploma in 1926, with one year's interneship.

Q. Then where did you commence your practice?

A. Well, following one year's interneship, I took a residency in surgery at Wabash Employees Central Hospital in Decatur. I spent a year as senior surgical resident at that place. Following that I came to Tucson.

Q. When did you come to Tucson? [410]

A. I came to Arizona in September, 1927. I spent seven months in the Indian Service until I decided to locate in Tucson, moving to Tucson about the first of April, 1928.

Q. What has been the scope of your practice since coming to Tucson?

A. On coming to Tucson, I associated myself with an obstetrician by the name of Peterson, Charles A. Peterson; also with Dr. Victor Gore, and I was Dr. Gore's surgical assistant for the next eight years, and carried on my private practice at the same time.

Q. Doctor, did you belong to any honorary societies in college?

A. Yes, sir.

Q. What were they?

A. Alpha Omega Alpha, which is honorary medical.

Q. Since your graduation have you been made a member or fellow of any surgical or medical societies?

A. Yes, sir.

(Testimony of William D. Carrell.)

Q. Will you state them, please?

A. Well, I belong to the local societies, Pima County Society, Arizona State Society, American Medical Society. In 1935 I was made a fellow in the American College of Surgeons. I think it was in 1938—I am not sure of the year—I was made an organization member of the International College of Surgeons. In 1941 I was certified by the American Board of Obstetrics and Gynecology. [411]

Q. Doctor, you are acquainted with Dr. Edward J. Donovan, the plaintiff in this case?

A. I have met him.

Q. Was the occasion of your meeting him the time he came out from New York to operate on the Jeffcott baby?

A. It was.

Q. Did you witness the operation, doctor?

A. I did.

Q. Did you discuss the operation before and after the performance of the operation, with Dr. Donovan?

A. Yes.

Q. Do you know the condition of the patient prior to the time the operation was performed?

A. Yes, sir.

Q. I believe you delivered the baby, did you not?

A. Yes.

Q. And were in attendance upon the mother?

A. That is right.

Q. Drs. Thompson and Tappan were the pediatricians in charge of the baby itself?

A. That is right.

(Testimony of William D. Carrell.)

Q. And your collaboration with them was incidental to your employment? A. That is right.

Q. Do you know the condition of the baby after the operation? A. Yes, sir.

Q. You have personal knowledge of his condition before and [412] after the operation?

A. I do.

Q. And you have personal knowledge of the operation that was performed? A. I have.

Q. Do you have any exact knowledge, doctor, as to the standing or qualifications of Dr. Donovan?

A. You mean——

Q. Not in detail, but generally.

A. My understanding is that he is a very good surgeon.

Q. Practicing in New York City?

A. That is right.

Q. Now, doctor, what was the nature of the operation?

A. The operation was for the correction of a congenital volvulus which resulted in an obstruction.

Q. Is that an operation which might be termed a major surgical operation? A. It is.

Q. Is it a serious operation from the standpoint of the probability of the patient recovering?

A. Yes, sir.

Q. Are there other operations, doctor, in the field of medicine of equal or greater gravity?

A. Yes, sir.

(Testimony of William D. Carrell.)

Q. Do you have personal knowledge of such operations? A. Yes, sir.

Q. Have you seen them performed? [413]

A. Yes, sir.

Q. Have you performed them yourself?

A. Yes, sir.

Q. Doctor, have you become familiar with and are you able to express an opinion as to the reasonable value of professional services of an eminent surgeon in performing an operation in the city of Tucson, based upon the following considerations: Your knowledge of what constitutes the reasonable value of professional services of a physician and surgeon; your knowledge of the elements entering into the determination of a reasonable value of such services; your knowledge in general of fees for such services in Tucson, Arizona, and in other cities in the United States; the background, schooling, training and experience of the surgeon and any particular qualification he may have to perform such specialized operation; the time such surgeon was required to be absent from his office and practice; the distance travelled; the age and condition of the patient; the nature, character and extent of such operation; the knowledge and skill required to perform such operation; the facts and circumstances tending to indicate whether or not the operation was successful, and whether the patient would be expected to recover; the financial condition of the patient or the person responsible for the payment

(Testimony of William D. Carrell.)

of such fee—Can you express an opinion as to the reasonable value of performing such services, keeping in mind [414] those considerations?

Mr. Allen: I object on the ground that it is immaterial and incompetent due to the fact that an affirmative answer thereto could not show that this witness was qualified as an expert to express any opinion as to the value of the services in the instant case.

The Court: This question is propounded to the doctor here, if he is in a position to express an opinion—that is the preliminary question?

Mr. Robertson: That is right.

The Court: And you want your objection in the record at this time?

Mr. Allen: Yes, your Honor, on the basis it is immaterial, because an affirmative answer would not show qualification on the part of this witness to express an opinion as to the value of such services.

The Court: I am going to treat this hypothetical question as I indicated Saturday, that is, I will let the question be answered in this case, and the hypothetical question, [415] with the ruling reserved after I have heard counsel, either by brief or oral argument. I think I should treat these interrogatories, though the questions are propounded here in open court—that I should give them the same consideration as I will the interrogatories that have come in in the New York depositions.

Mr. Allen: Then I shall not——

(Testimony of William D. Carrell.)

The Court: Simply get the questions and the answers in the record, and then I shall hear counsel. There may be totally different objections coming in on questions, the hypothetical questions propounded by the plaintiff and likewise by the defendant.

Mr. Allen: May I ask the court a question? May counsel, in approaching that ultimate decision of the court, state the extent of objections at that time, as well as the authorities in support of them?

The Court: State the objections succinctly and then give your authorities. I do not want to take the time at this time to do the research work and determine the questions. I do not think it is necessary at this time when the depositions are in here. I do not know that under the new [416] rules it is necessary to even note an exception, but save it, to protect your record.

Mr. Allen: I want to include within the objection the ground that the foundational question is incompetent and irrelevant for the reason that it neither contemplates or includes any showing on the part of this witness of knowledge as to the fees charged within New York for similar services, and upon the further ground that it does not contemplate or include any showing of qualifications on the part of this witness as to having any experience or knowledge concerning the particular type of service rendered.

(Testimony of William D. Carrell.)

Mr. Robertson:

Q. Do you remember the question?

A. Yes, sir.

Q. Are you able to express an opinion?

A. I am.

Q. Are you acquainted, doctor, with the fees customarily charged by local surgeons and physicians——

Mr. Allen: Object to that as incompetent and irrelevant and having no bearing on the issues in this case.

The Court: Go ahead with the question. [417]

Mr. Robertson:

——in a general manner, doctor?

A. Yes, sir.

Q. Are you acquainted in a general manner with fees that have been charged by eminent specialists who have come to Tucson from other parts of the country, and with the nature of the operations that they performed and the financial condition of the patients to pay the fees? A. I am.

Q. Now, doctor, assuming that Dr. Donovan is one of the eminent baby specialists practicing in New York City, and has attained some national recognition in such field or specialty; and assume that he came to Tucson, leaving New York on the first day of April, 1939, arriving here on Sunday morning, having travelled by plane; and then, based upon your knowledge of the consultations that were held, the operation which you witnessed, the condi-

(Testimony of William D. Carrell.)

tion of the baby which you observed, the condition of the baby after the operation; and assume that while he was in Tucson, leaving here on Monday morning, the third of April, 1939, he checked the charts and examined the patient on one or more occasions; assume that he then left by plane for New York, arrived back in New York during the afternoon of Tuesday, the fourth of April, 1939; and assume that thereafter, on several occasions, he communicated with Dr. Thompson, either by telephone, telegram or letter, in connection with the condition, post-operative [418] condition of the patient; and assume that prior to his departure from New York, he was informed by Dr. Hugh Thompson, one of the doctors in attendance on the baby, that expense was no item; and assume that on his arrival in Tucson, no negotiations were carried on with the parents of the baby, who are the defendants in this case, and no agreement was reached as to the amount of the fee to be charged by Dr. Donovan for his services; and assume that at the time of the operation, Mr. and Mrs. Jeffcott were the owners of a ranch in Southern Arizona, which had a gross value of approximately \$150,000, subject to an indebtedness in the amount of \$75,000, approximately \$75,000; and assume that during the year 1939, the operation expenses of the ranch amounted to some \$11,000, and the gross income from the operation of the ranch was some \$8,000, but that the ranch at that time was simply in its

(Testimony of William D. Carrell.)

formative state; and assume that from its operation in subsequent years, it now appears that commencing with the years 1942 or 1943, the ranch will produce a net income or profit of between \$5,000 and \$8,000; and assume that Mr. Jeffcott at that time had no other employment or source of income of any consequence; and assume, doctor, that the baby survived the operation, and, except for the development of fecal fistula, which lasted approximately eight or nine months subsequent to the operation, and a hernia which developed and which will require an [419] operation in the future, that the baby's recovery has been uneventful; and based upon those facts which you know, and the facts which you are assuming that have been covered by the question, do you have an opinion, doctor, as to the reasonable value of the professional services rendered by Dr. Donovan in connection with the operation upon the baby and the post-operative attention given the baby?

Mr. Allen: I object to the question as to whether he has an opinion on the ground that such an opinion could not be material.

The Court: All right. Very well. The witness may answer.

A. I do have such opinion.

Mr. Allen: I object to the opinion of this physician on the basis that no qualification has been shown, and on the further basis that the hypothetical question assumes questions of fact not appearing in the evidence in the case.

(Testimony of William D. Carrell.)

The Court: You may amplify that. You may answer the question, doctor.

A. I have such opinion.

Mr. Robertson:

Q. What is your opinion of a reasonable fee to be paid to [420] Dr. Donovan?

Mr. Allen: Same objection.

The Court: Same ruling.

A. I think that a fee, not including expenses, of two thousand dollars is sufficient.

Mr. Robertson:

Q. In your practice, doctor, have you given consideration to the ability of a patient to pay?

A. Always.

Q. In what way do you consider the patient's financial circumstances when you are estimating a fee?

A. You mean for a surgical operation?

Mr. Allen: I object to that as immaterial, wholly immaterial. What this witness does in determining his own fees is not binding on anyone else.

The Court: I think the objection is good. I think the witness probably could show what the practice or custom is among practitioners in cases of this kind, but as to what his special practice is, I do not believe it is material. [421]

Mr. Robertson:

I withdraw the question.

Q. Do you know of any particular custom or consideration that is given to the financial ability of the patient to pay? A. Yes, sir.

(Testimony of William D. Carrell.)

Q. Will you state that.

A. For a major operation, it is a very widely practiced custom, not only in Tucson but in many other places, to charge what is roughly from one-tenth of the annual income to one month's income.

Q. And in the expression of your opinion that a fee of \$2,000 would be reasonable compensation to Dr. Donovan, did you take into consideration his professional standing? A. Yes, sir.

Q. Did you take into consideration the distance that he travelled by airplane? A. Yes, sir.

Q. The time he was required to be away from his office? A. Yes, sir.

Q. The surgical skill which you saw him demonstrate? A. Yes, sir.

Q. And did you also take into consideration the facts relating to the financial condition of Mr. Jeffcott, as I have related them to you?

A. Yes, sir. [422]

Q. Do you know of other instances, doctor, where surgeons who had a national recognition in some specialized branch of surgery which would be comparable to that of Dr. Donovan, have come to Tucson and performed operations?

A. Yes, sir.

Q. Did you know anything concerning the financial condition of the patients upon whom the operations were to be performed? A. Yes, sir.

Q. Do you know of any such operations performed? A. Yes, sir.

(Testimony of William D. Carrell.)

Mr. Allen: Same objection, addressed to the whole line of questions—calling for specific instances in an attempt to prove a generality by specific instances. It is not proper evidence. It is immaterial what any other surgeon may have charged in any given case.

Mr. Robertson: I think the scope of my questions has shown them to be comparable, and I intend to point out distinctions.

(No ruling. No answer.)

Q. Do you know of any case, doctor, despite the fact that some of the patients may have had unlimited financial resources and despite the fact the operation was of equal gravity, or more so, than the one performed in [423] this case, where a fee of even half the amount of the fee charged by Dr. Donovan was charged? A. I do not.

Mr. Allen: I object to the question and move the answer be stricken. It is wholly immaterial what he might know in that respect. It is a highly improper question, argumentative.

The Court: Objection sustained. The answer will be stricken from the record.

Mr. Robertson:

Q. You do know, do you not, the amount of the charge Dr. Donovan made in this case?

A. I do.

Q. Now, I repeat the question: Do you know of any circumstance, any instance, where any surgeon of equal prominence as Dr. Donovan, has performed an operation in this city, of equal gravity,

(Testimony of William D. Carrell.)

where they have come from a point without the state into the state of Arizona, where the patients had unlimited resources, where a fee of even half the amount of this fee has been charged?

Mr. Allen: Same objection.

The Court: Objection sustained. [424]

Mr. Robertson: I don't know to what extent we must make an offer of proof.

The Court: Do you have that proof?

Mr. Robertson: We propose to prove by the answer of Dr. Carrell, had the objection not been sustained, that other operations of equal severity or gravity have been performed by other doctors of equal professional skill and ability to Dr. Donovan, upon patients having equal or much greater financial ability to pay, and that the maximum fee of the several known by Dr. Carrell was the sum of five thousand dollars, and that in each of those cases the doctors came from points without the state of Arizona.

The Court: That is the line of examination that your objection runs to?

Mr. Allen: Yes.

The Court: It is in the record that the objection is sustained.

Mr. Robertson:

Q. Dr. Carrell, at the conclusion of the operation who was [425] it that reported the condition of the patient, or the success of the operation, to the parents? A. I did.

(Testimony of William D. Carrell.)

Q. And did you have any discussion with Dr. Donovan while he was out here relating to the fee that he might charge or hope to get paid?

A. Not as to figures.

Q. And I will ask you first if such a discussion was carried on on your own hook, so to speak, or whether Mr. Jeffcott had made any request that you negotiate for him?

Mr. Allen: I object to that question as immaterial, and calling for hearsay.

The Reporter: (Reading)

Q. And I will ask you first if such a discussion was carried on on your own hook, so to speak, or whether Mr. Jeffcott had made any request that you negotiate for him?

Mr. Allen: I make the further objection that it is a leading question.

Mr. Robertson:

I withdraw the question and shall reframe it.

Q. How did such a discussion happen to take place?

A. Dr. Donovan asked me about the financial circumstances of Mr. Jeffcott.

Q. What did you say? [426]

Mr. Allen: No objection.

A. I told him that Mr. Jeffcott, Mr. David C. Jeffcott, was a man of very moderate means, but that his father did have considerable money.

Mr. Robertson:

Q. And you told him that while he was out here?

(Testimony of William D. Carrell.)

A. I told him that when we were leaving the Desert Sanatorium the day the baby was operated on.

Q. Did you know whether or not Mr. Jeffcott's father had, by writing or otherwise, guaranteed the payment of any fee that might be charged for the operation?

Mr. Allen: I object to that as immaterial.

The Court: The objection is good.

Mr. Robertson: You may cross-examine.

Cross Examination

By Mr. Allen:

Q. Dr. Carrell, do you devote your practice exclusively to surgery?

A. I think I have testified that I devote my practice to obstetrics and gynecology. [427]

Q. Primarily to obstetrics, is that not true?

A. That is not true.

Q. Have you ever performed an operation for the correction of complete obstruction due to congenital volvulus, as you described this Jeffcott operation?

A. I have not.

Q. Have you ever seen one other than the one performed by Dr. Donovan upon the Jeffcott baby?

A. Not exactly like it.

Q. Has one ever been performed in Tucson by any eminent specialist within your knowledge?

A. With the exact pathology, I know of no other.

Q. Have you ever performed an operation on an eight-day-old baby of that gravity, Dr. Carrell?

(Testimony of William D. Carrell.)

A. No, sir.

Q. Have you ever performed any operation upon an eight-day-old baby? A. Yes, sir.

Q. Beyond the gravity of circumcision?

A. Yes, sir.

Q. You have changed your mind about the reasonableness of Dr. Donovan's fee since August, 1939, have you not? A. I have not.

Q. I will ask you to state whether or not you had a conversation with Dr. Hugh Thompson at your home, he coming there to discuss the matter with you, in which Dr. Donovan's fee or charge was the subject of the conversation, [428] such conversation taking place approximately during August, 1939.

A. I had a discussion with Dr. Thompson.

Q. I will ask you to state whether or not it is true that he came to you and asked you if you knew why Dr. Donovan's bill had not been paid.

A. That is right.

Q. I will ask you to state whether or not, in the course of that conversation, you did not state to Dr. Hugh C. Thompson that in your opinion if the charge had been between five thousand and seventy-five hundred dollars that it would have been regarded reasonable by you and that it would have long since been paid.

A. I made no such statement.

Q. And you were of the opinion at such time that two thousand dollars constituted a reasonable fee? A. Plus expenses.

(Testimony of William D. Carrell.)

Q. Now, doctor, do you make a practice of—I withdraw the question. You know it to be a fact, do you not, Dr. Carrell, that among surgeons of higher standing and reputation, regardless of where they may practice, it is not considered proper by other members of the profession of like standing for them to require the payment of a fee in advance of the performance of the service, or to require a commitment in advance of the performance of the service?

A. I do not understand who is requiring this. You bring [429] in surgeons and other surgeons. I do not understand the question.

Q. Do you know whether it is a practice among reputable surgeons to require their fee to be paid in advance of performance of the service, or not?

A. In some cases it is. I have done so, and I consider myself reputable.

Q. Regardless whether it is done in some cases or not, and not questioning your reputability, I again ask you whether or not that is a practice among surgeons of higher standing.

A. I know of one eminent surgeon who gets all of his fees in advance.

Q. And you know how that practice is looked upon by members of the profession, do you not?

A. It is not looked down on at all. It is a business proposition.

Q. It is done where a surgeon wants to make all out of an operation he can?

(Testimony of William D. Carrell.)

A. That is not right. That man's fees are very conservative, but they are paid.

Q. And it is true, is it not, Dr. Carrell, that among surgeons of reputable standing, where a substantial fee is required in advance of an operation, it is regarded as a commercial attitude on his part, is it not?

A. May I have the question read? [430]

The Reporter: (Reading)

Q. And it is true, is it not, Dr. Carrell, that among surgeons of reputable standing, where a substantial fee is required in advance of an operation, it is regarded as a commercial attitude on his part, is it not?

A. Would you please qualify what you mean by "commercial"?

Mr. Allen:

Q. You represent, do you, that you cannot answer the question intelligently?

A. I can answer your question intelligently, but I do not understand what you mean. There is a great difference between "commercial", which is purely business, and "mercenary", which is not business.

Q. Let us call it "mercenary".

A. I do not consider that mercenary.

Q. You do not? A. No.

Q. And that is the custom on which you arrange for the payment of your fees, is it, doctor?

A. What is the question?

(Testimony of William D. Carrell.)

The Reporter: (Reading)

Q. And that is the custom on which you arrange for the payment of your fees, is it doctor?

A. Part of my fees are paid in advance one hundred per cent; part nothing paid on them; on part of them a part-payment is made in advance. [431]

Mr. Allen:

Q. Do you have any knowledge, Dr. Carrell, as to what the practice and custom is among eminent surgeons, eminent pediatric surgeons, of New York City, or its metropolitan area, as to the amount they charge for operations such as was performed upon the Jeffcott baby?

A. I did not know there were any such eminent surgeons.

Q. They you do not have any such knowledge?

A. No, I do not.

Re-direct Examination

By Mr. Robertson:

Q. What was this conversation you had with Dr. Thompson?

A. Dr. Thompson came to see me to see what he could do about settling the bill. Evidently, from what he told me, he came at Dr. Donovan's request.

Q. All right, what was that discussion?

A. I do not recollect all of it. That is impossible.

Q. I mean as nearly as you can recall, doctor. Give us the substance of that conversation.

(Testimony of William D. Carrell.)

A. We discussed what we thought about the fee, particularly what I thought about it, and I stated flatly that it was an exorbitant, ridiculous and purely fantastic fee.

Q. All right. What was Dr. Thompson's attitude? A. I did not ask him.

Q. Did he state whether or not he thought twelve thousand dollars was a reasonable fee in this case? A. He did not. [432]

Q. And did you make any such statement as Mr. Allen asked you about a few moments ago?

A. I did not.

Q. Now, doctor, what operations have you performed upon infant children of equal or comparative gravity to the one performed by Dr. Donovan on the Jeffcott baby?

A. By infant children what age do you mean?

Q. Oh, any children in the first few weeks or months of their lives.

A. I have done one operation on a child between three and four months of age, with a very extensive intussusception, which was of severity.

The Court: A little louder.

A. I have done one operation on a child between three and four months of age for intussusception, which is an obstruction, not congenital, but acquired after birth.

Mr. Robertson:

Q. Is that operation of equal or similar gravity to the operation performed in this case?

(Testimony of William D. Carrell.)

A. Yes, sir. In fact, it was a very late case, in which the intussusception had been there for quite a while. The child was in very bad shape, in fact, was moribund at the time of the operation, and died following the operation.

Q. What other operation of a like nature have you performed? [433]

A. I have had very little infant surgery, young infants. I had one born with congenital hernia down in the umbilical cord, which I operated on on the obstetric table, successfully.

Q. What operations have you performed on larger, older patients?

Mr. Allen: I object to that, not proper cross-examination.

Mr. Robertson: Mr. Allen would like to limit my cross to what he wants to get out of Dr. Carrell. Now, your Honor knows there is more than one branch of a specialized nature, and there are operations on adults of equal or greater gravity than the one Dr. Donovan performed upon the Jeffcott baby. I asked Dr. Carrell about his qualifications to judge the skill of the operation.

The Court: As to the qualifications of the witness?

Mr. Robertson: In connection with the line of cross-examination carried on by Mr. Allen.

Mr. Allen: In spite of the new rules, I think the courts still follow the theory that when a counsel makes an individual his witness, he examines him

(Testimony of William D. Carrell.)

on direct, and the cross- [434] examination is conducted. This is re-direct.

The Court: The objection is sustained, Mr. Robertson. I am sustaining the objection on the ground that you are limited now as to the line of examination.

Mr. Robertson:

Q. What operations of a similar nature have you seen or participated in, Dr. Carrell?

A. I have helped many other surgeons operate on babies with obstruction of the bowels.

Q. Were any of those surgeons eminent New York surgeons?

A. I never assisted a New York surgeon.

Q. Are there any eminent surgeons who live in the United States and do not live in New York City?

A. Yes, sir.

Q. Have you helped any of those?

A. Yes, sir.

Q. Who are they?

A. One man is Nelson Mortimer Percy, of Chicago.

Q. Is he considered pretty fair?

A. I consider him the best operator I ever saw work.

Q. All right. Who else?

Mr. Allen: Same objection, your Honor. It is improper examination at this time. It might have been pertinent on the direct examination of the witness. [435]

(Testimony of William D. Carrell.)

The Court: Yes, I think so, Mr. Robertson.

Mr. Robertson: Mr. Allen asked if it was not the first time he had ever seen any operation of this gravity. I would like to have Dr. Carrell tell your Honor——

Mr. Allen: I asked Dr. Carrell if he had ever seen mal-rotation of the intestines as a result of congenital volvulus.

The Court: If you want to limit your question to that——

Mr. Robertson: I do not think it is of much consequence, so I withdraw the question.

Mr. Allen: That is the reason I objected. I do not think it is of any consequence.

Mr. Robertson: That is all. May I have Dr. Carrell excused?

The Court: Very well. If the counsel do not require him here, he may be excused.

Mr. Robertson: Call Dr. Gore. [436]

VICTOR M. GORE

called as a witness herein on behalf of the defendants, having been first duly sworn, according to law, was examined and cross-examined and testified as follows:

Direct Examination

By Mr. Robertson:

Q. Will you state your name, please?

A. Victor M. Gore.

(Testimony of Victor M. Gore.)

Q. Where do you reside?

A. Tucson, Arizona.

Q. What is your profession?

A. The practice of surgery.

Q. How long have you been engaged in that practice, doctor?

A. Since 1923.

Q. Will you give us your educational background in connection with the study of your profession?

A. I graduated from a little college in Illinois; took my medical training at Washington University at St. Louis; served internship in the city hospital there.

The Court: What was the college from which you graduated?

A. Lackford College, a little literary college.

Mr. Robertson:

Q. When did you graduate?

A. From college in 1904 and in medicine in 1908. [437]

Q. Did you belong to any honorary or scholastic society?

A. I belonged to a medical fraternity called the Phi Deltas.

Q. And where did you start your practice?

A. In Oklahoma.

Q. How long did you practice there?

A. Until 1923.

Q. From what date?

A. From 1910 to 1923.

(Testimony of Victor M. Gore.)

Q. And then you came to Arizona?

A. Yes, sir.

Q. How long have you specialized in surgery?

A. Since 1918.

Q. And all of the time that you have been in Arizona, you have specialized in surgery?

A. Yes, sir.

Q. What organizations do you belong to?

A. To the state, county and AMA medical societies. I have been a member of the College of Surgeons since 1921; certified by the American Board of Surgery in 1938.

Q. Are those organizations considered honorary in the profession? A. Yes, sir.

Q. And what distinction do you hold at the present time in connection with surgery?

A. I do not know whether I get what you mean, unless it would be that I am the only general surgeon certified by the Board in the state of Arizona at the present time. [438]

Q. That is what I meant, doctor.

A. There is one other, but he is not in the state now, Dr. Greer, of Phoenix.

Q. Have you become acquainted with the customs and manner of fixing fees for surgical operations?

Mr. Allen: Just a moment. I wish to interpose a record objection to the question, as being incompetent and immaterial, and too broad in its scope.

The Court: What is that?

(Testimony of Victor M. Gore.)

Mr. Allen: I wish to object to that question as having no propriety in that it is too broad in its scope to appear from it whether it has any materiality as to any issues in this case.

The Court: You object to the question because it does not limit the situation to the one presented by this cause?

Mr. Allen: Neither primarily or situationally.

Mr. Robertson: He objected a while ago because I was too narrow, and now because I am not narrow enough.

The Court: The witness may answer. [439]

The Reporter: (Reading)

Q. Have you become acquainted with the customs and manner of fixing fees for surgical operations?

Mr. Robertson:

Q. —by surgeons who are practicing in this vicinity or over the country at large?

A. I would say yes.

Q. And what are the considerations that enter into the fixing of a professional fee for surgery?

A. As far as I know, my practice and the general practice is to fix a fee commensurate with the ability of the patient to pay.

Q. The ability of the patient to pay is one element that is considered by you in fixing the fee, and it is the custom that prevails?

A. Yes, sir, it is the largest element as far as I am concerned always.

(Testimony of Victor M. Gore.)

Q. And what other considerations enter into it?

A. The type of the operation, the time consumed, the aftercare required, the skill of the individual operator, all would probably have some bearing, but in the final analysis irrespective of what operation it is, it must stand or fall upon the ability of the patient to pay. Every man doing surgery probably does half his surgery without compensation at all, and what would be a fair fee for one person might be an impossible fee for another. You [440] cannot do it like you buy a bale of hay or a sack of sugar, but what is usually the case, as far as I know, and from common knowledge, is ten per cent of a person's income.

Mr. Allen: I object to the dissertation on the part of the witness and move the latter part of his answer be stricken.

Mr. Robertson:

Q. I will ask you in what way, then, doctor, do you consider the financial condition of the party in fixing the fee?

A. The income of the patient.

Q. And for a major surgical operation, what is the customary practice, if you know?

Mr. Allen: If your Honor please, I object to the question as calling for the opinion of one witness as to his own practice in that respect, and not throwing any light whatever upon the issues before the court, and not based upon any foundation.

(Testimony of Victor M. Gore.)

The Court: The witness may testify as to the practice, if he knows.

Mr. Robertson: He said the general, widely accepted.

The Court:

Q. Was that your testimony, doctor? [441]

A. Yes.

Mr. Robertson:

Q. Will you go ahead, please, and state in what way you consider a patient's income as an element in fixing a fee for an operation.

A. Ten per cent of the patient's income is considered a fair fee for major surgical procedures.

Q. That is, the patient's annual income?

A. Yes, sir.

Q. In a case, doctor, where an outstanding surgeon, such as Dr. Donovan, comes into the state of Arizona and performs an operation, are there any other additional elements you take into consideration?

A. Yes, sir.

Q. Will you name them, please?

A. Where a man has made a long trip away from home, he certainly should be compensated further than if he lived at the place where the operation is done.

Q. Do you feel qualified, doctor, to express an opinion as to the reasonable value of professional services of an eminent surgeon performing an operation in the city of Tucson, giving consideration to the various elements you have already testified to?

(Testimony of Victor M. Gore.)

A. Yes, sir.

Q. Doctor, you know Dr. Donovan?

A. I met him once, the day of the operation.

Q. That is the operation on the Jeffcott baby?

[442]

A. Yes, sir.

Q. And were you acquainted with the condition of the patient prior to the operation?

A. I had never seen the patient prior to the operation.

Q. In the course of your discussion of the matter with Dr. Donovan, were you made acquainted with his condition prior to the operation, and what the operation was for?

A. In a general way, yes. I was introduced to Dr. Donovan the day of the operation. He very kindly invited me to be present, and in the discussion with Dr. Thompson and Dr. Carrell and Dr. Donovan, I was informed that this was a congenital obstructive lesion.

Q. Did you have occasion to observe the manner in which the operation was performed by Dr. Donovan?

A. Yes, sir.

Q. And what he did in the course of the operation?

A. Yes, sir.

Q. Do you know the outcome of the operation, as to whether or not it was successful?

A. It was.

Q. Doctor, based upon your knowledge of the condition of the patient, the nature, extent and the

(Testimony of Victor M. Gore.)

manner in which the operation was performed by Dr. Donovan; the condition of the patient after the operation, as to whether or not he survived; and assuming that Dr. Donovan is one of the most eminent baby surgery specialists in the City of New York, and that at the request of Mr. Jeffcott, he left [443] New York on Saturday night, April first, and came to Tucson, arriving here Sunday morning, coming by plane; that he examined the charts and consulted with the attending physicians; performed the operation, stayed here until Monday morning, until eleven o'clock, leaving by plane, and returned to New York, and arriving in New York City Tuesday afternoon; and assume that there was no definite agreement reached between Dr. Donovan and Mr. Jeffcott as to the amount of compensation; and assume that at the time of the operation, or during that year, Mr. Jeffcott was engaged in the development of a ranch lying near Patagonia, Arizona, and that the market value of the ranch was, roughly, \$150,000, subject to an indebtedness of, roughly, \$75,000; that the operation expenses of the ranch for that year exceeded the ranch income by some \$3,000, but that was in part due to the fact that Mr. Jeffcott had the ranch in the formative stage, and was unable to sell and dispose of any cattle so that he could offset the expenses with any income; assume that operations since that time have resulted to where he can now anticipate an annual income of between five and eight thousand dollars, the mar-

(Testimony of Victor M. Gore.)

ket value of the ranch having been increased now, at the present time, to \$199,000, with an indebtedness of \$128,000 against the property; and also assume that upon Dr. Donovan's return to New York that, on several occasions he communicated with and exchanged ideas and suggestions with Dr. [444] Thompson, who was in charge of the patient, with your assistance—I will ask you to state, doctor, as to whether or not you have any opinion as to a reasonable fee to be charged by Dr. Donovan for the services performed.

Mr. Allen: Same objection, your Honor, to this foundation question. It is an immaterial question in that if answered in the affirmative, it would not show that this witness is qualified to answer the question; furthermore, that the hypothetical part of the question assumes matters not in evidence in the case.

The Court: You may answer the question, Doctor.

A. Yes, sir.

Mr. Robertson:

Q. Will you state what, in your opinion, constituted a reasonable fee for his services?

Mr. Allen: Same objection.

The Court: Same ruling. Answer the question.

A. I think that, taking into consideration the fact that he [445] had made the trip from New York out here, that he should certainly be paid

(Testimony of Victor M. Gore.)

twice as much as a doctor here should have charged for the same services. In addition to that, I think his complete expenses should have been paid. I should say that, in my opinion, a fair fee would be somewhere between fifteen hundred and two thousand dollars, and his expenses.

Mr. Robertson:

Q. Now, doctor, you attended the baby after the operation, did you not?

A. I saw him three or four times, with Dr. Thompson, after the operation.

Q. Have you ever performed an operation similar to the one that was performed upon this infant?

A. I have never even seen a case like this. I have seen many cases of volvulus in older children, but this was the first case of this kind I have ever seen.

Q. Have you ever seen or performed any operations for similar conditions?

A. For obstructions, yes. I have had a number of cases of partrisa of the pylorus at the end of the stomach, and in older children I have had many cases of intussusception and a number of cases of volvulus.

Q. From a standpoint of the gravity of the operation or condition of the patient, from the surgeon's standpoint, would you say they compare with the gravity of the condition of the Jeffcott baby?

(Testimony of Victor M. Gore.)

A. Practically alike in the fact that if the condition is not relieved, the condition is not compatible with life.

The Court: I did not get that answer.

A. Unless the condition such as existed with this baby, of complete obstruction of the bowel, is relieved, the child will perish.

Mr. Robertson:

Q. From the standpoint of the operator, is a condition of that kind more difficult to relieve than a condition of intussusception?

A. Intussusception may be a very minor thing. If the bowel is not open and a resection is not required, it is rather a simple thing, and would simply require a reduction of it. The thing that makes for gravity is the amount of work that has to be done.

Q. Have you performed operations of equal gravity? A. Yes, sir.

Q. I do not suppose you could give us any estimate of how many major surgical operations you have performed, doctor?

A. Well, a good many. I don't have the number. I have been continuously at it for more than twenty years now.

Q. Do you keep any records?

A. I do not keep a record as to number. The records are all available. [447]

Q. You are more interested in your work than the number of operations you perform?

(Testimony of Victor M. Gore.)

A. I never had any special interest in the number.

Mr. Allen: I object to this facetious examination. I will stipulate that he is more interested in his surgical work than in his numerical records.

Mr. Robertson: Thank you. You may cross-examine.

Cross Examination

By Mr. Allen:

Q. Dr. Gore, are you personally engaged in the practice of your profession, limiting it practically exclusively to surgery? A. Yes, sir.

Q. Have you ever operated upon a newborn infant in the eighth day of its life for a condition of the gravity and seriousness involved in the Jeffcott operation? A. Yes, sir.

Q. It is true, is it not, Dr. Gore, that it is more difficult to perform—Let us put it this way: That the younger the infant, the more difficult it is to perform the operation upon the infant?

A. That is very true, yes, sir.

Q. And the younger the infant the shorter the time during [448] which that patient will sustain its resistance in the course of an operation?

A. The time element is certainly a factor, if that is the point you are making.

Q. The older the infant, the longer his resistance will be sustained?

A. Certainly the older the infant, the more resistance he has. Are you trying to get at the length of time consumed in the operation?

(Testimony of Victor M. Gore.)

Q. I will ask you a further question, Dr. Gore. It is true, is it not, so far as your knowledge extends on the subject, that a new-born infant will continue to resist through an operation up to a certain point and then very rapidly and suddenly abandon all resistance?

A. I am sorry, I do not get what you mean.

Q. You would not feel as constrained to haste in the completion of an operation in a six-months-old child as a six-day-old child? A. No.

Q. The time element would certainly be the great factor, would it not?

A. Yes, sir.

Q. I believe you testified that never in the course of your surgical practice had you even witnessed an operation on all-fours or closely similar to the one performed on the Jeffcott baby?

A. No, not with this particular type of lesion, where it was [449] a congenital volvulus, involving the twisting of the small bowel. I think they are pretty rare.

Q. Have you ever practiced your profession in New York City? A. No, sir.

Q. You are not familiar with the practice and custom of the more eminent surgeons of that locality as to their charges, are you?

A. Only from what others have told me.

Q. But you do not know of your own knowledge what the custom is, the custom and practice is, in the city of New York?

(Testimony of Victor M. Gore.)

Mr. Robertson: I object to the question, because the doctor has stated that is all he knows, what the other doctors have told him. That is all any doctor can know, is what they have found out by hearsay. In fact, that is all Dr. Donovan knows, is what someone else told him. It must be based upon a common knowledge or common custom. The entire evidence is either objectionable or you are going to have a lot in the evidence about the custom and practice of other doctors.

The Court: Answer the question.

A. Only what men practicing there have told me.

Mr. Allen:

Q. Now, Dr. Gore, you testified, I believe, that it is your [450] practice to ascertain a patient's income and then charge him for a major surgical operation ten per cent of his annual income?

A. That is true.

Q. Now, Dr. Gore, assuming a case in which you might be called upon to perform a major surgical operation, and in the course thereof, you may be called upon to travel a great distance from your city of practice, the place in which you conduct your practice; assuming that you were called there by virtue of your reputation in the performance of the operation needed, your past experience; and assuming that you performed an operation of gravity and seriousness on a par with the operation performed upon the Jeffcott baby, and that the par-

(Testimony of Victor M. Gore.)

ents in that instance claim to have no income, but they represent to you that they have substantial worth, and they represent to you further that the father of one of those parents is a man of substantial wealth, and they indicate to you that they are in a business, conducting a business which involves the ownership of property of substantial value, do you mean to say that you would not regard that you were entitled to charge any fee for your services, because, at the moment, those parents had no income?

Mr. Robertson: I object to the portion of the question which relates to the financial condition of the parents, because it could have no possible bearing upon the fee the doctor [451] could charge, if he were trying to do it in a fair and reasonable way, unless there was some legal obligation upon the part of the grandparents to pay for the operation.

Mr. Allen:

Q. I wish to amend that question. I omitted to state in regard to that question, Dr. Gore, that if you understood further, and were correctly advised, that this father of the parent had made gifts to the parent which had permitted him to set up this business of substantial value, and if it further appeared that such grandparent of substantial wealth had for a period of years paid the operating expenses, or advanced the operating expenses, of the parent of the infant patient, would you then,

(Testimony of Victor M. Gore.)

and under all of those circumstances, assume that because of the lack of income of said parent of the infant patient, you were not entitled to charge for your services? A. Certainly not.

Mr. Robertson: I renew my objection to the grandparent and any financial responsibility of the grandparent to pay for the operation.

The Court: The question has been answered. The ruling may be reserved.

Mr. Allen:

Q. Now, Dr. Gore, let us assume a little further in this [452] matter. Assume that you were an eminent surgeon, that is, a surgeon of eminent standing in the field of experience and qualifications for the performance of a specialized operation——

A. Tell me what you mean by that. What constitutes an eminent surgeon?

Q. I withdraw that portion of the question. Assume, Dr. Gore, that you had had a very broad background of experience in the field of performing the operation which was performed on the Jeffcott baby——

A. That would be an impossible thing to do because the condition is so rare that no man could have a broad background in that field.

Q. Let us assume that you had performed fourteen of those operations, and that you, in association with another pediatric surgeon, had reported upon the performance of twenty operations of that

(Testimony of Victor M. Gore.)

sort, and that these reports had been publicized and were matters of knowledge among pediatricians in the country, and that you had had a long period of training which particularly qualified you to perform that operation, and you had had an opportunity to perform it fourteen times. That is understandable to you, is it not?

A. Perfectly.

Q. Let us assume that at some point two thousand miles distant from your place of practice your background in that [453] respect was known to pediatric surgeons or pediatricians, and, as a result thereof, you were suggested to be called to that community to perform that particular operation; and let us assume that the parents of the infant involved in this situation, when your name was suggested, directed the pediatrician in charge of that infant to communicate with you and determine whether or not you would perform that operation here in Tucson. Let us assume further that that pediatrician in the other community made contact with you and made an appointment with you, under which arrangement you were to see this baby here in Tucson, as soon as they could bring it to you, and you were to operate upon it, perform that particular operation, if needed. Let us assume that thereafter this pediatrician had a further conversation with the father of this child, and at that time the father of the child asked this pediatrician to again call Dr. Gore by long distance, and to arrange for

(Testimony of Victor M. Gore.)

him to come to Tucson, Arizona, at once. And let us further assume that in the course of that conversation between that father and that attending pediatrician the father had advised the pediatrician that money or expense were no item. Let us assume that that pediatrician then got in touch with you again and asked you if you would come to Tucson and perform the operation; and let us assume that you hesitated in making your response; and let us assume that at such point in such negotiations [454] this attending pediatrician advised you that the father of said infant had said that money and expense were no item. Now, I want to ask you, Dr. Gore, whether you would have felt, under those arrangements, that there was any duty upon you in the conduct of your professional activity to negotiate further with the parents of that child for the fee, before performing the operation.

A. Well, I think it would depend upon how well I knew the man who was talking to me, and if I expected to charge a large fee, I would certainly name the fee and ask who was going to pay it.

Q. In other words, if you were going to charge a large fee, you would want to know where the fee was coming from before you went out to perform the operation?

The Court: I did not get the answer.

A. I think it is a perfectly fair question to inquire who is to pay it, and the ability of the person to pay it.

(Testimony of Victor M. Gore.)

Mr. Allen :

Q. Then, based on the wealth of your experience, Dr. Gore, you want the court to understand here that it is your belief that, notwithstanding that Mr. Jeffcott, the defendant in this case, when advised of the condition of his child, when advised by attending physicians that it would be advisable to have his baby operated upon by [455] some surgeon outside of Tucson, when negotiating, giving instructions to the attending pediatrician for the employment of Dr. Donovan to come here and perform the operation, Dr. Donovan having been selected at the request of the attending pediatrician, advised Dr. Thompson that money was no object in getting Dr. Donovan to come here, and Dr. Donovan having come here to perform the operation, the father made no advances toward him, had no discussion with him concerning the fee at any time; that thereafter, after the operation had been successfully performed and the surgical condition had been properly corrected, upon receiving his bill indicating the amount of Dr. Donovan's charge, waited approximately twenty days and then wrote to Dr. Donovan and advised him that he was a poor man in that all he had was a hundred and fifty thousand dollar ranch, subject to a fifty thousand dollar mortgage; and that under those circumstances you believe that all that it was reasonable for Dr. Donovan to charge was between fifteen hundred and two thousand dollars?

(Testimony of Victor M. Gore.)

A. The reply to that question is based on income.

Q. Let us assume further that Mr. Jeffcott at such time advised the doctor that he had no income, but at the time was spending about twelve thousand dollars that year for the personal expenses of his family, do you still feel that under those circumstances the maximum reasonable fee the surgeon would be able to—that the [456] surgeon would be entitled to would be between fifteen hundred and two thousand dollars?

Mr. Robertson: Before this question is answered, I want to renew my objection upon the incorporation of the idea in the question that the grandfather of the child has any responsibility whatsoever for the payment of any fee.

Mr. Allen: The grandfather has not even been mentioned in this question.

The Court: I thought you were quoting from the letter.

Mr. Allen: From the letter, that during that year his family expenses were twelve thousand dollars.

The Court: Go ahead and answer the question, doctor.

The Witness: Will you read the question?

The Reporter: (Reading)

Q. Let us assume that Mr. Jeffcott at such time advised the doctor that he had no income, but at the time was spending about twelve thousand dol-

(Testimony of Victor M. Gore.)

lars that year for the personal expenses of his family, do you still feel, under [457] those circumstances, that the maximum reasonable fee the surgeon would be entitled to would be between fifteen hundred and two thousand dollars?

A. Yes, I think it would.

Mr. Allen: Take the witness.

Redirect Examination

By Mr. Robertson:

Q. And, doctor, in connection with the question Mr. Allen has just asked you, would the fact that over six thousand dollars out of the twelve thousand dollars referred to by Mr. Allen was for medical expenses in connection with the same baby you have operated upon, lead you to believe that fifteen hundred to two thousand dollars was a reasonable charge?

Mr. Allen: I object to that question, as the doctor has testified here it would not affect him in the least; therefore it would not make any difference as to what the twelve thousand dollars was spent for. He said that in spite of it, he still believed that was a reasonable fee. It does not make any difference to him, he said, what the money was spent for.

The Reporter: (Reading)

Q. And, doctor, in connection with the question Mr. Allen [458] has just asked you, would the fact that over six thousand dollars out of the twelve thousand dollars referred to by Mr. Allen was for

(Testimony of Victor M. Gore.)

medical expenses in connection with the same baby you have operated upon, lead you to believe that fifteen hundred to two thousand dollars was a reasonable charge?

Mr. Robertson:

Q. Answer the question.

A. I think it would.

Q. Now, doctor, have you been told by surgeons or doctors or physicians practicing in New York and vicinity and, for that matter, in other large cities all over the United States, as to their custom of taking into consideration the financial ability of the patient to pay? A. Yes, sir.

Q. Would you say that that is a generally well-recognized custom?

A. I think it is a very widely recognized one.

Q. Doctor, in connection with so-called specialists in any particular line of work, where perhaps they devote more of their time to doing one thing, and finally become very proficient in one particular line, would you say they are entitled to any very considerable amount of money more for any one operation than a surgeon who is called upon to devote his energies, his intellect and his ability to a considerable number or variety of types of operations? [459]

Mr. Allen: I object to the question as to its form, its comparative features. It is a question not susceptible to an accurate answer. I think there are

(Testimony of Victor M. Gore.)

other ways of getting at what is desired here, but I do not believe that is the way.

The Court: It is a question involving the qualifications of the surgeon?

Mr. Robertson: No, but where a man chops in the same groove every day, he is not entitled to any more for the time and skill he puts into a job than a general surgeon who performs many types of operations, when you are figuring what constitutes a reasonable fee for any particular service.

Mr. Allen: That is a highly argumentative form of question, your Honor.

The Court: Did you get the question?

The Witness: I think I know what he means but I am not sure I do.

Mr. Robertson:

Q. Will you answer, doctor?

A. You are asking for the custom or for my opinion?

Q. For your opinion. [460]

A. I think so.

Q. In other words, in computing his fee for services, you would take into consideration the same elements that you have taken into consideration in fixing any fee of a surgeon, whether he be general or special?

A. Yes, sir.

Mr. Robertson: That is all.

Re-cross Examination

By Mr. Allen:

Q. Do you know the custom of charges of a rec-

(Testimony of Victor M. Gore.)

ognized specialist in comparison to a general practitioner?

A. I know the custom of John Edmond Sinclair and Joseph Blake, of New York City, whom I think Dr. Donovan will admit are fairly reputable surgeons.

Q. You know their charges are higher than those of ordinary surgeons, do you not?

A. I do not know that their charges are any higher than in the west. In fact, I think they are higher in the west, but I am satisfied of this: That they are based upon the patient's ability to pay, and there is no hesitation in charging any kind of fee, if the patient is able to pay, but any one of them would operate on them for nothing.

Q. You think the ability of the patient to pay is particularly controlling? [461]

A. I think it is the only fair way to do it.

Q. From your viewpoint it practically controls the amount of fee that any surgeon should charge for any operation?

A. Yes, sir.

Q. That is what I want to get at. And it is your opinion that a person worth one hundred thousand dollars should not be called upon to pay a penny more, to ask one of those doctors to come here from New York because of his recognized skill and specialized training, than they should to hire any surgeon anywhere?

Mr. Robertson: I object to the form of the question.

(Testimony of Victor M. Gore.)

The Court: No, I think not.

Mr. Robertson: Very well.

A. I think I have already testified that he ought to be charged twice as much and his expenses.

Mr. Allen:

Q. That is merely because he went away from his practice, rather than that he had any skill?

A. That was based upon the skill, that he was away from home and making a long trip.

Q. In other words, under those circumstances, you would [462] take into account only the financial condition of the obligated party and the fact the surgeon was called upon to leave his field of practice?

A. I think he should be paid more than a local man and paid more than he would be paid for similar services performed in his home town.

Q. He should be paid more because he is called upon to leave his home and go elsewhere?

A. Absolutely.

Q. And you still maintain that no matter what a wealth of experience he had in performing the operation required by the patient, he should receive no greater fee?

A. In fixing the fees, no, sir, because they must be based entirely upon the patient's ability to pay them.

W. PAUL HOLBROOK

called as a witness herein on behalf of the defendants, having been first duly sworn, according to law, to testify to the truth, the whole truth and nothing but the truth, was examined and cross-examined and testified as follows:

Direct Examination

By Mr. Robertson:

Q. Will you state your name, please?

A. W. Paul Holbrook. [463]

Q. Where do you live, Dr. Holbrook?

A. Tucson, Arizona.

Q. What is your profession?

A. I am a physician.

Q. Are you specializing in any type or in any particular branch of your profession?

A. I am an internist and diagnostician.

Q. What has been your educational background?

A. How much do you want?

Q. Well, hit the high spots.

A. I graduated from the University of Washington as a chemical engineer, and from the University of Oregon as an M. D. I did post graduate work at Harvard for six months; post graduate work abroad for a year, and post graduate work each summer for approximately two or three months in various clinics of the country.

Q. How long have you been engaged in the practice of your profession?

A. Eighteen years, I believe.

(Testimony of W. Paul Holbrook.)

Q. Where have you practiced your profession?

A. In Portland, Oregon, San Francisco, and here for the last thirteen years.

Q. Since coming to Tucson have you been practicing by yourself or connected with some institution?

A. Both ways.

Q. Would you state what your connections have been?

A. I was physician in chief at the Desert Sanatorium for [464] six years and have since that time been in Tucson, in town, practicing with an assistant.

Q. And have you secured any honorary degrees, or do you belong to any associations having honorary significance?

A. I belong to the American College of Physicians and am certified by the American Board of Internal Medicine as a specialist. I belong to a lot of medical societies. You don't want those, do you?

Q. I think not, doctor. In the course of your practice, have you become sufficiently familiar with the branch of surgery to be able to express an opinion as to the reasonable value of the services of an eminent specialist in baby surgery, coming from New York to perform an operation in Tucson?

Mr. Allen: I shall again object to this type of foundational question on the ground that it is wholly immaterial. There has been no foundation laid for this particular question in that it is affirmatively assumed that this proposed doctor is not a surgeon,

(Testimony of W. Paul Holbrook.)

and on the grounds of my previous objection, that an affirmative answer could not tend to show any qualification of this witness to give any expert opinion on the fee charged in this case.

The Court: This is the same?

Mr. Allen: [465]

The Court: The witness may answer the question.

The Reporter: (Reading)

Q. In the course of your practice, have you become sufficiently familiar with the branch of surgery to be able to express an opinion as to the reasonable value of the services of an eminent specialist in baby surgery, coming from New York to perform an operation in Tucson?

A. I should like to answer the question by saying I have had many consultants——

Mr. Allen: I suggest, your Honor, that the witness be advised that the question calls for a “yes” or “no” answer.

The Court: It is a preliminary question.

A. All right. The answer is “yes”.

Mr. Robertson:

Q. From what source or sources, doctor, have you gained that information?

A. Well, I have been obliged on a number of occasions to call consultants from various other towns out of Tucson, and Tucson specialists as well. My internal medicine situation requires frequent surgical consultation.

(Testimony of W. Paul Holbrook.)

Q. Have you had occasion to consult with surgeons from New [466] York or in eastern cities?

A. Yes, sir. I have brought none of them to Tucson, but have consulted with them there. Is that what you mean?

Q. From these consultations, have you found their customs or the things they take into consideration when fixing the reasonable value of their surgical services?

A. Are you asking, Mr. Attorney, what they use as a guide to a fair fee ?

Q. Yes, doctor, I am asking you that question.

A. The usual guide to a fair fee by a consultant or any other physician is the patient's ability to pay, and the fee is set with the patient's circumstances in mind, and even for a major operation, sometimes they use ten per cent of the yearly income as a rough basis, although that is not always done.

Q. Do you know whether or not the surgeons of the city of New York and other large cities of the United States use that system in fixing fees?

A. I would not say that is universal, but it is used in the city of New York and elsewhere.

Q. I am talking about the general ability to pay and not the ten per cent?

A. The general ability to pay is always used.

Q. By the New York surgeons, as well as others?

A. That would be my judgment.

Q. I believe you have testified that you have had occasion to collaborate with and confer with leading surgeons from [467] all over the United States?

(Testimony of W. Paul Holbrook.)

A. That is true.

Q. May I ask whether you, in pursuit of your profession, ever make use of airplane travel?

Mr. Allen: I object to that as incompetent and irrelevant.

Mr. Robertson: We have a five thousand dollar item in the bill before the court because of the hazards of airplane travel, and I propose to show it is a very customary method of travel.

Mr. Allen: That is a matter for argument, whether or not there is any five thousand dollar item in here for airplane travel. However, it is immaterial as to how any physicians or surgeons travel to go anywhere. The sole question is whether this expert witness knows anything that can enlighten the court on the value of these services, and he certainly has not qualified as an expert on the reasonableness of the fee of an eminent specialist.

Mr. Robertson: I would not have called Dr. Holbrook here if I did not intend to ask him what is a reasonable fee for Dr. Donovan's services, but I am not limited in my direct. This is a question to lay the foundation for his opinion. [468]

The Court: If it is an element of the doctor's estimate of what the services are worth, an element to be taken into consideration in arriving at what is a reasonable fee, it is admissible. There has been some testimony of Dr. Donovan and others that he came to Tucson by airplane.

Mr. Robertson: Dr. Donovan testified that the trip by plane was worth five thousand dollars to

(Testimony of W. Paul Holbrook.)

him and figured in the estimation of the fee to that extent.

Mr. Allen: The mode of travel of Dr. Donovan is certainly competent, but the means by which this expert travels, or any other expert travels, throws no light upon this issue, and if this question is designed to develop the means by which this physician or any other physician travels to any point, it is immaterial.

The Court: Dr. Holbrook stated that he has had occasion to consult with several physicians from out of Tucson.

Mr. Robertson: Yes, sir, and as I recall some have come here by airplane.

The Witness: I don't think I made that statement. [469]

Mr. Robertson:

Q. Do you know whether physicians or surgeons coming to Tucson have come by air?

Mr. Allen: I object to that as immaterial. It can have no earthly bearing on this case.

Mr. Robertson: I think it has a very substantial and fundamental bearing. It is a matter the court is going to have to take into consideration.

The Court: The court will permit the witness to be asked if the element of coming by air for any distance is an element in fixing the fee.

Mr. Robertson:

Q. Very well. Doctor, do you consider that when a physician or surgeon comes from a point outside

(Testimony of W. Paul Holbrook.)

this state, say from New York, to perform an operation or for consultation, the fact that he may travel by air, instead of automobile, ship or other means of transportation, should enhance the amount he is to charge?

A. It would not occur to me that it would play any part in the charge at all.

Q. Now, doctor, have you become familiar with and are you able to express an opinion as to what would be a reasonable [470] fee for an eminent surgeon performing an operation in the city of Tucson, based upon the following considerations: Your knowledge of what constitutes a reasonable value for professional services of a physician or surgeon; your knowledge of the reasonableness of such fee; your knowledge of fees for such services in Tucson and other cities in the United States; the background, schooling and training of such surgeon, and any special training he has had; the time such surgeon is required to be absent from his office and practice; the distance travelled; the age and condition of such patient; the knowledge and skill required to perform such operation; the facts and circumstances tending to indicate whether or not the operation was successful and the patient could be reasonably expected to recover; the financial condition of the patient or the person responsible for the payment of such fee—do you feel you are able to express an opinion as to the reasonable value of professional services in a given case, based upon those considerations?

(Testimony of W. Paul Holbrook.)

Mr. Allen: I wish to object to the foundational question, and in this instance, I wish to urge that the Court depart from the past procedure, because of the different circumstances which prevail here. This foundational question calls for the opinion of an internist upon the question of fees of a surgeon, and the testimony of this witness clearly shows that in the light of the law, such [471] opinion is not material; and I object to the foundational question on the ground that there is no foundation for the same, and that in no circumstances could this witness ever qualify as an expert in this case. Surgeons to surgeons, lawyers to lawyers, internists to internists, is the law of the case. I can read some law on the question, if desired. I heartily approve of the court's decision to receive the testimony of all experts who may qualify under any theory, but here is such a gross departure from any possible qualification——

The Court: The witness on the stand is no more qualified to pass on the operation than a dentist would be. Is that what you say?

Mr. Allen: I don't believe he is a bit more qualified than a blacksmith, so far as the fee, or the reasonableness of the fee of a surgeon is concerned, with all due respect for Dr. Holbrook's qualifications as an internist. He is not a surgeon and cannot possibly express an opinion on this matter, except from unmitigated hearsay.

Mr. Robertson: I don't believe there is any

(Testimony of W. Paul Holbrook.)

branch of the medical study, and particularly where a man has a broader scope of knowledge of everything pertaining to surgery, medications, [472] pathology, clinical symptoms, and everything that goes into the treatment of sick persons than a diagnostician. Dr. Holbrook says that he is an internist and diagnostician. A diagnostician has to have a fundamental knowledge of the pathology, the symptoms, and everything on a much broader scale than anyone who is practicing in any particular little line of the entire practice. He more closely approaches a general practicing attorney.

The Court: This question is one I think the court should inquire into. My conception of internship is that that is a term of apprenticeship, after obtaining his degree in medicine.

Mr. Allen: I meant to say one engaged in the practice of internal medicine. I call the court's attention of Jones on Evidence, Vol. 2, Section 386, the statement appearing on page 730: "As to the value of professional services, only persons engaged in that profession may express opinions." There is a clear distinction between the practices of internal medicine, with a specialty in diagnosis, and the practice of surgery, and I have other cases to the effect that only a surgeon is qualified to testify as to the fee of a surgeon.

The Court: You ask the court to strike out the entire testimony of [473] Dr. Holbrook? I will not do that until I have examined the authorities.

(Testimony of W. Paul Holbrook.)

Mr. Robertson:

Q. Doctor, are you still in your internship?

A. No, sir.

Q. Will you tell the court generally the nature of your work as a diagnostician, having particularly in mind its relation to surgery?

A. My work consists of—

The Court:

Q. Let me ask at the outset of your testimony, in response to Mr. Robertson's question as to your qualification, what were the terms you used?

A. When one graduates from medical school and finishes his internship, and then does several years of post-graduate work, he goes usually toward general practice or as a specialist. Most men do general post-graduate toward surgery or toward diagnosis. The job of the diagnostician is to examine a patient, find all that is wrong with him if he can. He calls a surgeon after he has decided, for instance, that the gall bladder needs removing. He calls the surgeon and says "This patient has a gall bladder". The surgeon will concur in the diagnosis and remove the gall bladder. The internist or diagnostician is the one ordinarily who calls the surgeon to see a patient who has a problem of one kind or another, [474] and arranges with the surgeon for the operation.

Mr. Robertson:

Q. Then, in pursuing your profession, doctor,

(Testimony of W. Paul Holbrook.)

have you become acquainted with the schedule of fees, or the way surgeons estimate their fees?

A. I deal with it all of the time.

Q. Would you say your knowledge is limited only to Tucson, or the general practice over the United States?

A. I see a great deal of it over the whole country in my professional activity.

Q. Your patients come, I presume, from all over the country?

A. Yes, that is correct.

Q. Do you have to work with doctors from other various communities?

A. Correct.

Q. In that way, have you gained information as to the basis on which those doctors or surgeons fix their fees?

A. I think so, without any question.

Q. Do you have such knowledge along the eastern seaboard and in New York?

A. Yes, sure.

Q. Doctor, you are not acquainted with Dr. Edward J. Donovan, the plaintiff in this action?

A. I am not.

Q. And you know nothing of the facts relating to the operation that he performed upon the Jeffcott baby, other than in a pre-trial discussion you had with me? [475]

A. I do not.

Q. Doctor, I will ask you to confine your opinion to the facts I narrate to you in this hypothetical question. Assume that Dr. Edward J. Donovan, who maintains offices at 826 Park Avenue, in the city of New York, after having fulfilled his educational

(Testimony of W. Paul Holbrook.)

study, had reached the point where he was considered as one of the eminent baby surgeons in New York and had attained some national recognition as being outstanding in his line of practice; that on the 31st day of March, 1939, Drs. Tappan and Thompson and Carrell diagnosed the condition of Robert Jeffcott, the son of Mr. and Mrs. Jeffcott, the defendants in this action, as consisting of complete obstruction of the small intestine, due to volvulus, and determined that an operation would be necessary; that they so advised Mr. and Mrs. Jeffcott, and Dr. Thompson, being acquainted with Dr. Donovan, recommended that he be called to perform an operation, and that Dr. Thompson called Dr. Donovan and suggested that the baby be brought back to New York by airplane and the operation be there performed; that Dr. Donovan agreed to perform the operation; that after the telephone call it was concluded by the doctors and the parents that Dr. Donovan should be consulted to see if he would, in turn, come to Tucson to perform the operation; that during the course of these discussions, Dr. Donovan inquired as to the financial circumstances of Mr. and Mrs. Jeffcott, and that Dr. Thompson told him [476] that cost was no item, or expense was no item; that Dr. Thompson had previously discussed the matter with Mr. Jeffcott, and asked him if expense was any item, and Mr. Jeffcott had either told him that expense was no item, or nothing within reason; that Dr. Donovan agreed to come to Tucson; that he left New York Saturday night by plane, and

(Testimony of W. Paul Holbrook.)

arrived in Tucson Sunday morning; that upon reaching Tucson he conferred with Drs. Thompson, Tappan and Carrell, examined the charts and clinical evidence, and agreed with them in their diagnosis, confirmed their diagnosis, performed the operation, and, in the course of the operation, he found the following pathology to exist: That there was no fusion between the gastro-colic omentum and the transverse mesocolon of such infant; that the cecum and the ascending colon of such infant lay in the upper right quadrant of the abdomen; that the small intestine of such infant, beginning at a point about twenty centimeters from where the duodenal-jejunal junction should be, was turned to the right, around the root of the mesentery; about two and one-half complete turns; that the lower half of this intestine was blue and completely collapsed; that the terminal ileum of such infant was bound down to its mesentery by a definite, firm band which almost completely kinked it; and that the duodenum of such infant instead of taking its normal course passed downwards and emerged from its retroperitoneal position by passing through an opening in the [477] mesentery of the terminal ileum about ten centimeters from the ileocecal junction; and if it be further assumed that the said Dr. Donovan, in the further course of performing such operation at such time and place and in the further course of his said employment undertaking, did enter such infant by and through a right rectus incision, did bring

(Testimony of W. Paul Holbrook.)

the cecum of such infant down to its normal position, did cut away the band on the ileum of such infant, did then untwist the volvulus by turning all of the small intestine of such infant about two and one-half turns in a counter-clockwise direction, did then attach the cecum of such infant to the parietal peritoneum in the right lower quadrant of the abdomen of such infant by the use of two interrupted sutures of chromic and did then complete such operation by closing the abdomen of such infant in layers; and if it be further assumed that Dr. Donovan remained in Tucson until the following morning, Monday morning, leaving Tucson at eleven o'clock, and returned by air to New York City; and was back in the City of New York Tuesday afternoon; and that while he was in Tucson, he examined the data and reports on one or two occasions, and, after his return to New York, communicated with Dr. Thompson by telephone and telegram on several occasions; and if it be assumed that there was no discussion had while he was in the city of New York as to the financial condition of the parents, and that after his return, on May 1st, he sent a statement to Mr. Jeffcott in the sum of twelve thousand [478] five hundred dollars; and that at the time the statement was sent, he had not had any discussion with Mr. Jeffcott relating to his financial circumstances; and if it be assumed that the baby survived the operation; that he was required to stay in the hospital some six weeks after the operation,

(Testimony of W. Paul Holbrook.)

and had a fecal fistula condition which lasted for some eight months, and at the present time is suffering from a hernia, but otherwise the operation was successful; and if it be assumed, doctor, that at the time of the employment of Dr. Donovan by Mr. Jeffcott that Mr. Jeffcott was engaged in the ranching business in the southern part of Arizona, his total assets consisting of a ranch having a value of \$150,000, against which there was an indebtedness of approximately \$75,000; that his income for that year amounted to \$8,000; that his ranch operating expenses amounted to \$11,000; but that this fact, or the fact that his operating expenses exceeded his income by about \$3,000 was because his ranch was in its formative stage, and he was purchasing cattle and not selling off any cattle, from the proceeds of which he could pay such operating expenses; but that the subsequent operation of the ranch indicates at this time, although it is still being operated at a loss, that he can expect a net income from his ranching operations of from \$5,000 to \$8,000, separate and apart from all living expenses, which are not included in any of the figures I am giving you; and taking all of those factors [479] into consideration, doctor, I will ask you to state whether or not you can express an opinion as to the reasonable value of the services of Dr. Donovan in performing that operation, in coming to Tucson, and returning to New York?

Mr. Allen: I make the same objection to the foundational question, your Honor.

(Testimony of W. Paul Holbrook.)

The Court: The objection you have added to since the other objection is that the witness on the stand is not qualified to express an opinion as to these particular surgical services, because he is a doctor of medicine.

Mr. Allen: There is no foundation for this foundational question.

The Court: The question may be answered and the ruling reserved.

The Witness: May I clarify it with the attorneys, to see if I understand it?

The Court: All right.

The Witness: As I understand it, Dr. Donovan left Saturday afternoon [480] and returned Tuesday afternoon, and that while here he operated this child for congenital volvulus.

Mr. Allen: I think the question is clear and move that this colloquy be stricken.

Mr. Robertson: He can state whether or not he can state an opinion, and I submit that he may ask any questions he would like to have clarified.

The Court: You have heard the hypothetical question?

The Witness: Yes.

Mr. Robertson: You can express an opinion——

The Witness: That the child was operated and the doctor returned to New York; that the parents of the child have as total assets, or all that they have in the world, is a ranch which at present has no income, but which eventually will bring an in-

(Testimony of W. Paul Holbrook.)

come of from five to eight thousand dollars. I am concerned about the income of the parents, because that is what doctors usually base their fees on. [481]

Mr. Allen: I again ask that the conversation be stricken, and that the witness be instructed that the question calls for a "yes" or "no" answer.

The Witness:

A. I have answered yes that I can testify to its value.

Mr. Robertson:

Q. Will you give us your opinion as to the reasonable value of those services?

Mr. Allen: I object to any opinion on the part of this witness, first, on the ground that he has shown definitely that he is entirely unqualified to give an opinion, and, secondly, that the hypothetical question propounder to him is improper because it contains many assumptions which are without the evidence in this case; further that the hypothetical question does not fairly represent the matter to the expert.

Mr. Robertson: May I ask Mr. Allen to point out to the Court the elements wherein the question is deficient?

The Court: The witness may answer the question with the understanding that if there are elements not borne out by the record, and, with a long question like that, the Court [482] would hesitate to hazard an opinion without examination of the several elements.

(Testimony of W. Paul Holbrook.)

Mr. Robertson:

Q. Doctor, based upon the facts as I gave them to you, and as you now understand them, will you now express your opinion as to the reasonable value of your services?

A. I should say a specialist coming from New York might be entitled to double the fee a local specialist would charge, which, at most, would be ten per cent of the man's annual income. That would be my rough estimation of the value of such services.

Q. Do you take into consideration the true annual income of 1939, when the operation was performed, or what his expected income will be?

Mr. Allen: I object to that as wholly immaterial and improper. The doctor has testified as to what he thinks the fee should be, and he says it should be twenty per cent of the annual income, and if there is no annual income, it would be zero.

(There was no ruling upon this objection, and no answer.)

Mr. Robertson:

Q. Assuming that at the time the operation was performed, [483] the ranch was in its formative stage, its gross worth was \$150,000, subject to an indebtedness of \$75,000, and your answer was that you would fix the fee as twenty per cent of his annual income?

A. Average annual income.

Q. Would you project that into the future, when

(Testimony of W. Paul Holbrook.)

his plan for developing his ranch had materialized, and his average income was then determined?

Mr. Allen: Objected to because of the nebulous character of the examination.

The Court: The objection is good.

Mr. Robertson:

Q. In dollars and cents, doctor, based on the statement of his financial condition and the plan he had, what fee would you expect him to pay for the services performed? Can you give us something in dollars and cents?

Mr. Allen: Same objection that went to the original hypothetical question.

The Court: The witness may answer the question. [484]

A. From my understanding of his circumstances, I would say something like \$2,000. That is as near as I could come to it. He is not a pauper, certainly.

Mr. Robertson: You may cross-examine.

Cross-examination

By Mr. Allen:

Q. You are not a surgeon?

A. I have a degree in surgery, but I do not practice surgery.

Q. You have never practiced surgery?

A. Yes, I have.

Q. When and for how long?

A. For two years.

(Testimony of W. Paul Holbrook.)

Q. Since then you have practiced medicine as distinguished from surgery?

A. Yes, that is correct.

Mr. Allen: No further question.

Mr. Robertson: That is all. It is my understanding that each of the doctors may be excused.

The Court: Yes.

Mr. Robertson: I wonder if I might have about five minutes. I think [485] I am about ready to close my case.

The Court: We will recess for ten minutes.

Mr. Robertson: If your Honor please, I have no more testimony, but I would like to offer in evidence Defendant's Exhibit A, which sets forth the figures Mr. Jeffcott used in his testimony.

The Court: All right, it will be admitted.

Financial Statement admitted in evidence and marked Defendants' Exhibit A.

[Defendants' Exhibit A is set out at page 23 of this printed record.]

Mr. Allen: I move for recess until tomorrow morning at the usual time. I had no way to estimate the length of time that would be consumed by the defendants' testimony. I understood there would be four expert witnesses, and our rebuttal testimony will be from physicians, and I had indicated to them they would not be required until tomorrow morning.

The Court: Your rebuttal will be limited to testimony by physicians?

Mr. Allen: Yes, and incidentally it will be quite brief. [486]

The court convened at ten o'clock in the morning, February 3, 1942, with the same appearances as at previous sessions during this trial.

Mr. Allen: Call Dr. Thompson.

HUGH C. THOMPSON

called as a witness on behalf of the plaintiff, and having been previously duly sworn, was called in rebuttal, and testified as follows:

By Mr. Allen:

Q. In the course of the conversations which you had with Mr. David C. Jeffcott, on or about March 31, 1939, relative to the employment of Dr. Donovan, was any statement made to you with reference to putting pressure upon Dr. Donovan to compel him to come here?

Mr. Robertson: Just a moment. I object to that as improper rebuttal.

Mr. Allen: If your Honor please, the denial of that was made by defendant on cross-examination, and I think is entitled to be rebutted at any time during the trial. [487]

Mr. Robertson: He brought that out when he put Mr. Jeffcott on in cross-examination, in his cross, and it is improper rebuttal at this time.

The Court: The objection is overruled and the witness may answer the question.

(Testimony of Hugh C. Thompson.)

A. When I was discussing with Mr. Jeffcott the possibility of Dr. Donovan coming here, Mr. Jeffcott suggested that if Dr. Donovan was reluctant to come that pressure might be put on him by Dr. Palmer, connected with the Presbyterian Hospital, and whom I understand is a good friend of Mr. Jeffcott's father.

Mr. Allen:

Q. Now, Dr. Thompson, you continued in attendance on the Jeffcott infant subsequent to the operation, did you not? A. Yes.

Q. And you made certain reports to Dr. Donovan relative to the fecal fistula developed by that infant, did you not? A. Yes, sir.

Letter marked Plaintiff's Exhibit No. 7 for Identification.

Q. Handing you Plaintiff's Exhibit 7 for Identification, Dr. Thompson, I will ask you to state what that document is. [488]

A. A letter I wrote Dr. Donovan on April 29, 1939.

Q. I ask if it constitutes a report concerning the fecal fistula which the baby had developed at that time. A. It does.

Mr. Robertson: I object to that, as the letter is the best evidence, and move to strike the answer.

(No ruling.)

Mr. Allen: I ask that Plaintiff's Exhibit 7 for Identification be admitted in evidence.

The Court: Is there any objection?

(Testimony of Hugh C. Thompson.)

Mr. Robertson: Not to the offer. I object to the previous question and move to strike the answer, and object to the offer as being improper rebuttal.

Mr. Allen: I asked the question as having a bearing on the fecal fistula that was brought out as one of the assumptions in each of the hypothetical questions—the duration of the fecal fistula was brought out in each hypothetical question.

The Court: Objection overruled. [489]

Mr. Allen:

Q. What was the condition of the fecal fistula at the time of that communication?

A. It was a very small opening in the wound from which exuded from time to time a small amount of fluid.

Q. Was there any excretion of fecal matter at that time? A. No, sir.

Mr. Allen: Please mark this Plaintiff's Exhibit 8 for Identification.

Letter marked Plaintiff's Exhibit 8 for Identification.

Mr. Robertson: I make the same objection.

The Court: It relates to the same matter?

Mr. Allen: Yes, your Honor. It is a report three days earlier than Exhibit 7. Is it admitted, your Honor?

The Court: Yes.

Plaintiff's Exhibit 8 for Identification admitted in evidence and given the same number in evidence.

(Testimony of Hugh C. Thompson.)

[Plaintiff's Exhibit No. 8 is set out at page 22 of this printed record.]

Mr. Allen:

Q. What was the condition of the child three days earlier, [490] on April 26th, Dr. Thompson?

A. I am afraid I would have to refresh my memory on that.

Q. I ask you to examine Plaintiff's Exhibit 8 and state whether or not that correspondence constitutes a report on the condition of the patient on April 26th. A. Yes, it does.

Q. Refreshing your memory by reference to that report, Dr. Thompson, what was the condition of the fistula on that date?

A. The fistula was getting very much smaller in size, and the amount of drainage lessening. The child's general condition was excellent.

Q. Now, Dr. Thompson, I ask you to state whether or not you made any medical report on the case of the Jeffcott infant for publication?

A. Yes, I did.

Q. And where was that report published, Dr. Thompson?

Mr. Robertson: I object to the question because this certainly is improper rebuttal.

Mr. Allen: I will avow it has to do with the fecal fistula and the course thereof. It is a foundational question.

Mr. Robertson: He had Dr. Thompson here and had a chance at this in his case in chief, and now

(Testimony of Hugh C. Thompson.)

he comes along in his [491] so-called rebuttal——

Mr. Allen: I want to rebut the testimony that this fecal fistula remained in existence for eight months, or for more than one year.

The Court: The matter of the condition of the child after the operation was raised, I think, by the defendants' case, on direct examination.

Mr. Allen: That is the theory on which the testimony is offered.

Mr. Robertson: It was brought out in his case in chief.

The Court: In offering testimony along that line from Dr. Thompson, what is the matter you are directing your attention to now?

Mr. Allen: The fecal fistula and its duration.

The Court: In this case?

Mr. Allen: Yes, in this case. [492]

The Court: And you are now refreshing his memory as to that?

Mr. Allen: For the purpose of refreshing his memory, if necessary, as to the condition of that infant within a certain time after the operation was performed.

The Court: Very well. You have your objection in the record, Mr. Robertson.

Mr. Allen:

Q. Now, Dr. Thompson, what was the condition of the Jeffcott infant in reference to the fecal fistula when discharged from the Desert Sanatorium on or about May 9, 1939, at the age of forty-six days?

(Testimony of Hugh C. Thompson.)

A. There was a very small opening present, not large enough to insert a probe in, at least it would have been difficult, and from that came occasionally a very small amount of fluid. It did necessitate a dressing on the child.

Q. Approximately how long had it been since there had been any fecal discharge from that small opening?

A. I think I would have to refresh my mind to be accurate on that from that report. As I recall, there was a fecal discharge for about two to three weeks. I believe I have it in that report.

Q. Referring you to pages 237 and 238 of this report, will you refresh your memory in that respect? [493]

A. Fecal material came through for from two to three weeks. After that the drainage was fluid. Perhaps, sir, I should explain, if it has not been done, what we are talking about a little more.

Mr. Robertson: I object to any voluntary expression.

The Court: Yes, Mr. Witness.

Mr. Allen: Plaintiff's Exhibit 9 for Identification is offered in evidence. (Printed report.)

Mr. Robertson: Objected to for the same reason.

The Court: You only examined the doctor on this report that he prepared on this particular case?

Mr. Allen: Merely to the extent that he refreshed his memory.

The Court: I do not see the necessity for admitting it, if it is for that purpose only.

(Testimony of Hugh C. Thompson.)

Mr. Allen:

Very well, your Honor. [494]

Q. Now, Dr. Thompson, you previously testified that you examined the Jeffcott infant on or about the first of October, 1939. What were your findings at that time, Dr. Thompson, with reference to the existence either of fecal fistula or incisional hernia?

A. At that time there was a very tiny spot in the wound from which I was told there occurred perhaps a quarter of a teaspoon of drainage during certain twenty-four hour periods. As regards the incisional hernia, I did not find any. I found no incisional hernia with the child at any time when I examined it.

Q. Was there any indication on or about October 1st of any fecal drainage? A. No, sir.

Q. Was the opening of such a nature, Dr. Thompson as to indicate that a fecal fistula was present at such a time?

A. No fecal material could have come out of that opening.

Q. Now, Dr. Thompson, what part is played in the determination of the presence or absence of fecal fistula in the use of a probe, as mentioned by you?

A. A probe merely indicates the size of the opening; that is, if you can pass a probe in easily, you know the opening is that big. If you cannot, you know it is smaller.

Q. I ask you to state whether or not you had a conversation with Dr. Carrell relative to the

(Testimony of Hugh C. Thompson.)

fee charged by Dr. Dono- [495] van, such conversation taking place at Dr. Carrell's home, he and you being the only ones present, and such conversation taking place approximately during the first half of August, 1939? A. I did.

Q. I ask you to state whether or not that conversation was had as a result of your receiving from Dr. Donovan an inquiry concerning the payment of the fee for the operation he performed upon the Jeffcott baby. A. It was.

Mr. Robertson: I object to the introduction of this testimony, and move to strike the answer.

Mr. Allen:

Q. For the purpose of impeachment, I will ask you to state, Dr. Thompson, whether, in the course of such conversation, Dr. Carrell made the following statement to you, under the circumstances previously mentioned to you, such conversation being either exactly or in substance as follows: "I believe that had Dr. Donovan's statement been for any amount between five thousand and seventy-five hundred dollars that it would have been regarded as reasonable and would have been paid long since."

Mr. Robertson: Just a moment, there are new elements in that question that were not in the question asked Dr. Carrell when he [496] was on the stand yesterday. I would like to have Mrs. Burges find it for us, if possible. I think he said yesterday simply "Had the bill been for five thousand dollars

(Testimony of Hugh C. Thompson.)

or seventy-five hundred dollars, it would have been paid.”

The Court: The question is whether or not that statement was made.

Mr. Robertson: Yes, but before you can impeach a witness you have to lay the foundation and Mr. Allen is only permitted to ask the same question he asked Dr. Carrell yesterday and I don't remember anything in that question about whether the fee would have been regarded as reasonable.

Mr. Allen: I asked Dr. Carrell if he did not indicate to Dr. Thompson in that conversation that the fee would have been regarded as reasonable if it were in such an amount.

Mr. Robertson: Very well.

The Witness: What is the question?

The Reporter: (Reading)

Q. For the purpose of impeachment, I will ask you to state, Dr. Thompson, whether, in the course of such con- [497] versation, Dr. Carroll made the following statement to you, under the circumstances previously mentioned to you, such conversation being either exactly or in substance as follows: “I believe that had Dr. Donovan's statement been for any amount between five thousand and seventy-five hundred dollars that it would have been regarded as reasonable and would have been paid long since.”

A. That statement was made by Dr. Carrell.

(Testimony of Hugh C. Thompson.)

Cross Examination

By Mr. Robertson:

Q. Dr. Thompson, how long have you been practicing?

A. I started in private practice in October, 1933.

Q. How long did you practice in New York?

Mr. Allen: Object to that as improper cross-examination.

Mr. Robertson: It is a preliminary question.

The Court: The qualifications were gone over on direct, and particularly on the cross-examination, so I do not consider that is properly within the line of examination now.

Mr. Robertson:

Q. When did you first discuss this matter with Mr. Allen? [498]

A. I don't remember, Mr. Robertson.

Q. At any rate, it was before you got on the stand the other day to testify?

A. That is right.

Q. Did you have the consent of Mr. and Mrs. Jeffcott to discuss this matter with Mr. Allen?

A. Which matter?

Q. Any matter pertaining to the condition of this baby or the fee that was charged or any other matter that you acquired knowledge of in the course of your professional representation of Mr. and Mrs. Jeffcott?

A. No, I had no consent from Mr. and Mrs. Jeffcott.

(Testimony of Hugh C. Thompson.)

Q. And do you appreciate the privilege that exists on communications between a patient and a doctor? A. Yes.

Q. Did you have that in mind when you were talking to Mr. Allen?

A. Yes, everything I have said in reference to the case has been published in medical literature. I think you will find that there. I mean that everything I have told about the case itself, as a case, is there.

Q. Did you say anything in that publication about Mr. Jeffcott telling you he could put pressure on Dr. Donovan through Dr. Palmer?

A. No, of course not.

Q. Is there anything in that publication about expense being no consideration? [499]

A. No, of course not.

Q. About Dr. Carrell telling you if the bill had been for five thousand dollars or seventy-five hundred dollars, it would have been reasonable, and would have been paid? A. No, sir.

Mr. Allen: I object to this line of examination. It is improper, no objection having been made to any such testimony.

Mr. Robertson: It is pertaining to the very thing he has just testified to.

The Court: The witness has already answered the questions.

The Court: The witness has already answered the questions. Do you want to continue your examination along that line?

(Testimony of Hugh C. Thompson.)

Mr. Robertson: I may have a few more questions.

The Court: Go ahead.

Mr. Robertson:

Q. All of those were communications you received during the [500] time when you were the physician, the pediatrician in charge of the baby, weren't they?

Mr. Allen: Same objection.

The Court: Objection overruled.

The Witness: I did not quite get that question, all of those things?

Mr. Robertson:

Q. The things I have just enumerated to you.

A. Mr. Robertson——

Q. Will you please answer the question?

A. Yes, sir, they were. I——

Mr. Robertson: I submit the question has been answered.

Mr. Allen: The witness has a right to explain his answer.

The Court: Go ahead. Go ahead.

Mr. Robertson:

Q. You discussed this matter with Mr. Allen when a suit was pending against Mr. Jeffcott, the people who employed you to take care of this child? [501]

A. That is correct.

Q. Are you not aware that Dr. Carrell said, if he said anything, that if the figure had been between

(Testimony of Hugh C. Thompson.)

five thousand and seventy-five hundred dollars, it probably would have been paid?

A. I cannot tell you at this time the exact words, Dr. Carrell used. He did not bind the Jeffcotts. He did not represent them. It was a personal conversation. I went to him because he was a good friend of the Jeffcotts, and had been in on this case. I knew he would be apt to know more about their reaction than I would, and I wanted his idea, because I was disturbed.

Q. And it is just as likely that he said that if the figure had been between five thousand and seventy-five hundred dollars the bill would probably have been paid, as to have used the words Mr. Allen used?

A. He gave me the definite impression that it was his feeling.

Mr. Robertson: I object to the definite impression, and ask that the witness be instructed to answer my question.

The Court: Give as nearly as you recall the words of the conversation.

A. May I have the question again?

The Reporter: (Reading)

Q. And it is just as likely that he said that if the figure [502] had been between five thousand and seventy-five hundred dollars the bill would probably have been paid, as to have used the words Mr. Allen used?

(Testimony of Hugh C. Thompson.)

A. The question of reasonableness did not enter into our conversation.

Mr. Robertson: I move to strike that because it is not responsive.

A. But it is——

The Court: Don't argue. Read the question again.

The Reporter: (Reading)

Q. And it is just as likely that he said that if the figure had been between five thousand and seventy-five hundred dollars the bill would probably have been paid, as to have used the words Mr. Allen used?

A. No, sir.

Mr. Robertson:

Q. Is it your desire to testify that Dr. Carrell told you that in his opinion that that bill, or if a bill had been for five thousand or seven thousand five hundred dollars, that it would have been considered reasonable?

A. Yes, sir.

Q. And you cannot recall the exact words he used? [503]

A. No, sir, I cannot.

Q. And did you tell him that without consideration of the financial conditions of the patient, you thought twelve thousand dollars was a reasonable fee?

A. I made no comment to Dr. Carrell that night.

Q. Didn't you feel called upon to express your ideas when you went there to discuss the matter?

A. No, sir.

(Testimony of Hugh C. Thompson.)

Q. You did think that a fee of twelve thousand five hundred dollars was entirely out of reason, did you not? A. No, sir.

Q. Do you still refuse to give any consideration to the financial condition of the party who is to pay the fee? A. No.

Q. But you have not given any consideration to it when you say that that fee is reasonable, have you?

A. That is correct. You will recall my statement here before I specified that.

Q. Yes, doctor, I well recall your statement. This hernia you speak of was first discovered by Dr. Carrell shortly after your visit around the first part of October, 1939. Is that not true?

A. I don't know.

Q. Did you ever see the baby after that?

A. I do not recollect, Mr. Robinson, that I ever did see the baby after that.

Mr. Robertson: That is all. [504]

Re-direct Examination

By Mr. Allen:

Q. What explanation did you desire to make in connection with one of your answers to Mr. Robertson's examination?

Mr. Robertson: I object to the form of the question. Mr. Allen can specify what the question was and what the answer was.

(Testimony of Hugh C. Thompson.)

Mr. Allen:

Q. Relative to the statements made to you by Mr. and Mrs. Jefficot in the course of handling this case.

A. What I wanted to say was that I think that the medical profession regard a discussion of a fee for a case as somewhat different from revealing the medical details of the case.

Mr. Robertson: I move to strike the answer. It is argumentative and could have no bearing on the case whatsoever, because the law clearly defines what a communication amounts to between a doctor and a patient.

The Court: If there is any point in that, it is a matter for discussion.

Mr. Robertson: But in permitting a witness to answer the question [505] is evading the province of the court.

The Court: It may go out—be stricken from the record.

EDWARD J. DONOVAN

the plaintiff herein, having been called as a witness in his own behalf, and having been heretofore duly sworn, was called in rebuttal and testified as follows:

Direct Examination

By Mr. Allen:

Q. Dr. Donovan, just what is fecal fistula?

Mr. Robertson: If the Court please, I object to

(Testimony of Edward J. Donovan.)

that, because Dr. Donovan testified regarding this matter on his direct examination.

Mr. Allen: I don't believe there has been any definition of fecal fistula. Causes were gone into and this is along the same line of the rebuttal offered by Dr. Thompson regarding the fecal fistula. It was brought into the case by inclusion in every hypothetical question submitted by defendants.

Mr. Robertson: Dr. Donovan testified at considerable length on his [506] direct examination by Mr. Allen, stating the cause and quite a number of the details concerning it, and it is improper rebuttal.

Mr. Allen: It is a proper foundational question.

The Court: I will permit the question to be answered.

A. A fecal fistula is a fistula that drains fecal material, and fistula is any communication from one of the hollow parts of the body with the outside, with the surface of the body. A fecal fistula, then, is a fistula which drains fecal material.

Mr. Allen:

Q. When does a fecal fistula cease to be a fecal fistula?

A. When it stops draining fecal material.

Q. What are the medical or surgical findings that result, doctor, from the ability or inability to insert a probe into such an opening?

Mr. Robertson: Same objection.

The Court: Same ruling. You may answer the question.

(Testimony of Edward J. Donovan.)

A. If you cannot insert a small probe into a known fecal [507] fistula, it means that a fistula does not exist, providing it is not draining fecal material.

Mr. Allen:

Q. If such a condition develops following a fecal fistula, but drainage from the surface opening continues, what is the condition that exists then, under those circumstances?

A. It was stated that this wound was an infected wound on the fifth day, as brought out on the testimony—that that wound was infected on the fifth day, and an infected wound may drain for a long time. The reason for that, the main, common reason for an infected wound is that there is a catgut knot present, that is a knot of catgut used in sewing up the baby's abdomen after the operation. That knot does not come out of itself, and has to stay in until it is absorbed, and then the wound heals.

Q. From the medical reports brought to your attention concerning the Jeffcott baby, how long did the fecal fistula of such infant continue?

A. As I remember, it was nineteen days. It is stated very accurately in that report or in Dr. Thompson's testimony. As I remember, it was about nineteen days.

Q. And are there any statistical findings in reference to the length of time during which a wound infection may be expected to drain, doctor?

(Testimony of Edward J. Donovan.)

Mr. Robertson: That is objected to as calling for an answer which [508] could only be based upon hearsay.

The Court: The witness may answer the question.

The Reporter: (Reading)

Q. And are there any statistical findings in reference to the length of time during which a wound infection may be expected to drain, doctor?

Mr. Allen:

Q. Wound infection in a new-born baby, doctor.

A. I can answer that but not based on statistical findings but on my own experience.

Q. I withdraw the question. What has been your experience in reference to the length of time a wound incision in a newborn baby may drain?

A. It depends entirely upon what material is used in closing the wound. If you use silk, and the wound becomes infected, the wound may drain because of the presence of the silk for months and months. That is why you use absorbable material for babies, such as catgut. A baby has a very marked reaction to chromic catgut, which merely means tanned catgut. Chromic catgut may be so tanned as to stay ten days or twenty days in a wound, and the type of catgut you use in closing a baby's wound is ordinarily ten-day or twenty-day.

The Court: The only purpose of this examination is to show the [509] causes of the fecal fistula, and whether it healed up in an abnormal or normal

(Testimony of Edward J. Donovan.)

time after the operation. Beyond that, I do not believe it is necessary to elaborate on the situation.

Mr. Allen:

That is correct.

Q. What type of hernia, Dr. Donovan, could have resulted in the case of the Jeffcott infant?

Mr. Robertson: Object to the question unless foundation is laid.

Mr. Allen:

Q. With relation to the operation that was performed by you.

Mr. Robertson: Object to the question, unless a preliminary question is asked, establishing the fact that only one type of hernia may result, as the question calls for only one type of hernia.

Mr. Allen:

Q. What type or types of hernia could have resulted in the case of the Jeffcott baby with relation to the operation performed by you?

A. The only type that could have resulted is incisional hernia, which means hernia in the incision.

Q. Might such a hernia be properly described as a ventral hernia? [510]

A. Yes, ventral merely means on the front of the patient's body, rather than the back of the patient, which is called dorsal. Ventral is on the front.

Q. In the course of your practice as a pediatric surgeon, have you had occasion to observe incisional hernia in cases of operations upon the new born?

(Testimony of Edward J. Donovan.)

A. I have, many times.

Q. Will you state, Dr. Donovan, what the ordinary course of progress of such a hernia is?

A. Ninety per cent of these hernias get well without operation.

Q. Why is that, Dr. Donovan?

A. This applies to babies, and I think you specified that. It does not apply to adults.

Q. Yes, to the new born.

A. Ninety percent of them get well without operation, and because of that fact, we have a very definite policy at the Babies Hospital that every surgeon knows he has no right to operate on that hernia until he can prove to me, or another member of the staff, that the hernia is not going to get well, due to the progress and growth and development of the infant.

Q. What may be taken to be proof that such growth and development will not take place?

A. Well, if you go for a good length of time, and then find, for example, that the hernia is getting larger, or not getting smaller—no, I would say that it is [511] not getting larger—that in itself is not an indication for operating.

Q. How far do you carry these infants post-operatively before you decide an operation is necessary?

A. You have to prove to yourself and everyone else that you have given this hernia a chance to get

(Testimony of Edward J. Donovan.)

well through the growth and development of the child. I cannot state specifically about the length of time. It may be months and it may be years.

Cross Examination

By Mr. Robertson:

Q. Dr. Donovan, where did you put these permanent stitches in the baby?

A. As I explained the other day in my testimony, they are simply non-absorbable sutures which are placed a certain distance on each side of the wound, say half an inch.

Q. You mean the incision in the outer portion of the baby?

A. No, all the way through the abdominal wall.

Q. Through the abdominal wall? A. Yes.

Q. That is the place you put the permanent sutures?

A. May I use my finger to explain. Suppose this is the incision. The permanent suture will start over here and go through all the layers of the abdominal wall, except the innermost. This is the suture and is not tied. That is put in when the rest of the wound is [512] open, and they are put half or three-quarters of an inch apart all the length of that incision.

Q. And I think it was your opinion those permanent sutures were the things that caused the wound infection?

A. No, I never made such a statement.

Q. What caused the infection?

A. As I stated in my testimony the other day—

(Testimony of Edward J. Donovan.)

Q. Go ahead.

A. A baby is always wet, his diaper is always wet, and that predisposes his wound to infection, and I stated that this wound infection might have come first down where the cecum had been sutured to the parietal peritoneum, where it had to be sutured. That infection might have started there as an abscess, and at the point where this intestine had been anchored to the peritoneum or lining of the abdomen. I stated that could have been an abscess, the infection passing through the wall of the damaged intestine. I stated also that the fact that this wound drained clear material, or material that was not feces first and then, after four days, drained feces, made one suspicious that that was the condition that existed.

Q. What do you mean by that?

A. An abscess where the cecum had been anchored, the cecum that had been damaged by the obstruction. I stated also that this might have been an infection from the outside from the baby's wet diapers all the time, and I stated [513] also it might have been infected by material passing through the wall of the secum where it was anchored to the abdominal wall; that the infection might have come from the outside in, but was very much more likely to come from the inside out.

Q. And the fact that for a period of weeks there was a fecal discharge from this wound would mean what?

A. It simply means there was a hole in the intestine and the stuff would go through to the outside.

(Testimony of Edward J. Donovan.)

Q. What is fecal matter?

A. The waste matter the patient normally excretes through his intestines.

Q. And in order for that to take a short cut, it has to come through a hole in the intestine?

A. Yes, but I did not see the hole, nor did anyone else.

Q. And all of this testimony that this infection came from post-operative attention to the outside——

A. I never made such a statement.

Q. I am asking you now if that is true?

A. That is not true.

Q. You mean to say, then that this infection, instead of originating on the outside of the baby, is due to the fact that the wound becomes infected and eats a hole into the intestine, and this causes a fecal fistula?

A. I said simply it could cause fecal fistula.

Mr. Robertson: Mrs. Burges, will you read the question? [514]

The Reporter: (Reading)

Q. You mean to say, then, that this infection, instead of originating on the outside of the baby, is due to the fact that the wound becomes infected and eats a hole into the intestine, and this causes a fecal fistula?

A. Yes, sir, it can form an abscess, just as I have explained here, and that abscess can cause the fecal fistula.

(Testimony of Edward J. Donovan.)

Mr. Robertson :

Q. Is it not much more likely the infection would spread all over the outside of the stomach without eating through the intestine? A. No.

Q. Is it not a fact that the intestines, although being very thin, are formed of material that can resist infection from the outside to the same extent it holds in the strong stomach juices on the inside?

A. No, that is not true at all.

Q. Once you get a hole in the intestine through which fecal matter is exuding, will that heal itself?

A. Positively. You could not keep it open. A hole in the lining membrane of that intestine would have to have something to hold it open or it is apt to close. If that is not present in the wound, you could not keep that fecal fistula open, in spite of yourself.

Q. In view of the fact the fecal matter started to drain a short time after the operation, is it not much more [515] likely it is due to internal infection than any infection from the outside?

A. No, that is just the right time for the infection to travel in, the fifth day.

Q. The fifth day is just the right time from the outside in or from the inside out?

A. When you find an infected wound, the first thing you think is "He has an infected wound", and if he drains fecal material, the first thing you think is "He has an infection that is travelling in."

Q. Suppose you have a wound that does not show infection for ten days?

(Testimony of Edward J. Donovan.)

A. It is very much more apt to be the other way round. That is very much more apt to be from the inside out, but you cannot say definitely. The fifth-day infected wound appeared here, and that is very apt to be the cause of the rise in temperature and drainage of fecal material. The fact that fecal material drained on the ninth day, this might be caused by an abscess around the secum, where it had been anchored to the lining membrane of the peritoneum, and I stated also that because this wound drained first material that was not feces, and then drained fecal material, that was the most likely cause of the infection. Still it could have been an abscess caused on the outside from an infected wound.

Q. Still, it could have been a hole punctured in the intestine by your needle? [516]

A. No. If that were true, it would have appeared immediately. Of course that is not true. Do you suppose if you put a needle through the intestine, you would not hear from it for nine days?

Q. I am examining you.

A. That is an answer to your question.

Q. In your opinion, what was the cause of that fecal fistula? A. I have stated twice.

Q. State it again.

Mr. Allen: I object to the repetition. It has been gone into at great length.

The Court: Go ahead.

Mr. Robertson:

Q. What is your opinion of what caused the fecal fistula of the Jeffcott baby?

(Testimony of Edward J. Donovan.)

A. My opinion, as stated in my testimony before, is that it may have been due to two causes, just as I have stated before, and that is as close as I can get to it. I have explained my reason for it. One, the point where the already damaged intestine had been sutured to the point where it should have been, and where it was necessary to suture it, which I have called the right lower quadrant of the abdomen. I have stated it could have been an [517] abscess at that point, where that intestine was attached, and I stated my reason for thinking that.

Q. Which of the two, in your opinion, was probably the cause?

A. I cannot state. Either one may have been the cause. I may have gone so far as to state this might have been the cause, but either one may have been the cause. I cannot say what was going on inside the abdomen.

Q. And of course you know nothing about the hernia the Jeffcott baby has, and whether it will have to be operated or not? A. I never saw it.

Mr. Robertson: That is all.

Mr. Allen: That is all, doctor, the plaintiff rests, your Honor.

Mr. Robertson: At the close of the plaintiff's rebuttal, we move for judgment in favor of the defendants, because the plaintiff has failed to prove that Dr. Donovan was admitted to practice, or qualified to practice in the State of Arizona, or had any license to engage in practice here, and after that motion, we have no sur-rebuttal.

The Court: The motion will be denied. I saw the provisions of the statute before this trial started. [518]

Mr. Robertson: That is simply for the sake of the record, because the language of the statute is not entirely clear and there is some conflict of authority.

The Court: The motion will be denied. [519]

CERTIFICATE

State of Arizona,
County of Pima—ss.

I, Lenna H. Burges, certify that I am a duly qualified shorthand reporter; that I was sworn to report the trial of the case of Edward J. Donovan, plaintiff, vs. David C. Jeffcott and Elsie Jeffcott, his wife, defendants, being Civil Action, file No. 54-Tucson, in the United States District Court for the District of Arizona, on January 29, 30, 31, and February 2 and 3, 1942; that I did so report said trial, and the foregoing 519 pages of typewritten matter contain a full, true and correct transcript of my shorthand notes taken during the said trial, to the best of my skill and ability.

That I am not employed by nor related to any party to this action, nor to any attorney appearing therein, and I am not interested, directly or indirectly, with the outcome of this litigation.

Witness my hand at Tucson, Arizona, this the 18th day of July, 1942.

LENNA H. BURGESS.

[Endorsed]: No. 10251. United States Circuit Court of Appeals for the Ninth Circuit. David C. Jeffcott and Elsie Jeffcott, his wife, Appellants, vs. Edward J. Donovan, Appellee. Transcript of Record. Upon Appeal from the District Court of the United States for the District of Arizona.

Filed September 15, 1942.

PAUL P. O'BRIEN,

Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

In the United States Circuit Court of Appeals
for the Ninth Circuit

Case No. 10251

DAVID C. JEFFCOTT and ELSIE JEFFCOTT,
his wife,

Appellants,

vs.

EDWARD J. DONOVAN,

Appellee.

STATEMENT OF POINTS ON APPEAL AND
DESIGNATION OF PARTS OF RECORD

To: The Clerk of the United States Circuit Court
of Appeals for the Ninth Circuit

The appellants herein hereby adopt as their points
on appeal in this cause the Statement of Points on
Appeal appearing in the transcript of record which

has heretofore been certified to and filed with you by the Clerk of the District Court of the United States for the District of Arizona.

The appellants herein hereby request that the transcript of record as certified to by the Clerk of said District Court be printed in its entirety.

Dated this 18th day of September, 1942.

DARNELL & ROBERTSON
By LAWRENCE V. ROBERTSON
A Member of the Firm
410 Valley National
Building
Tucson, Arizona
Attorneys for Appellants.

Copy received this 18th day of September, 1942.

LESLEY B. ALLEN,
Attorney for Appellee.

